



December 2, 2002

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: CS Docket No. 02-52; FCC 02-77  
Appropriate Regulatory Treatment for  
Broadband Access to the Internet over Cable Facilities<sup>1</sup>

Dear Ms. Dortch:

On June 17, 2002, Amazon.com Holdings, Inc. (“Amazon.com”) submitted comments in this proceeding emphasizing the need to preserve and protect residential consumers’ unfettered access to Internet-based information, products and services (herein referred to as “Internet Content”). By this letter, Amazon.com is pleased to submit a memorandum from the law firm of Covington & Burling (Appendix A) that describes the FCC’s legal authority to adopt the necessary safeguards. Amazon.com also respectfully suggests a specific rule (Appendix B) by which the Commission could – without

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<sup>1</sup> Amazon.com also is submitting this letter in the following dockets: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185; Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20; and 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 98-10.

regulating ISPs or the Internet or mandating so-called “open access” – prevent service providers from discriminatorily impairing lawful consumer access to Internet Content.

### **Statement of Interest**

A pioneer in electronic commerce, Amazon.com opened its virtual doors in July 1995 and today offers books, electronics, toys, CDs, videos, DVDs, kitchenware, tools, and much more for sale through its website at [www.amazon.com](http://www.amazon.com). With well over 35 million customers in more than 160 countries, Amazon.com is the Internet’s leading retailer. Amazon.com is not a broadband service provider (“BSP” – *i.e.*, the provider of broadband communications service, by whatever technology, including coaxial cable, twisted pair, satellite, or wireless),<sup>2</sup> nor an Internet service provider (“ISP”) – narrowband or broadband. Yet, because residential consumer Internet access is an important issue to Amazon.com’s customers, and therefore to Amazon.com, we are grateful for this opportunity to offer our views.

### **Background**

Amazon.com’s June 17, 2002, submission described the fundamental and distinguishing characteristic of the Internet, namely the ability of consumers to “pull” Internet Content from any of billions of sources, rather than either having it “pushed” out to them, as in the mass media, or filtered in any unrequested way by intermediaries.

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<sup>2</sup> BSPs are distinct from broadband ISPs, which serve as the interface between BSPs and the Internet. *See* Appendix C, Figures 1 and 2. Amazon.com suggests that the FCC adopt a more formal definition of BSP along the lines of earlier Commission references to “advanced telecommunications capability” and “advanced service.”

Amazon.com believes the key principle that policymakers should carry forward into the era of broadband residential access is this: Consumers must retain their longstanding ability, within the bounds of applicable law, to access Internet Content without discriminatory impairment by intermediaries, which in the new world of broadband residential consumer Internet access are BSPs and broadband ISPs.

Amazon.com's June 17, 2002, submission also warned that, without some form of limited safeguards, economic incentives likely will drive BSPs and affiliated broadband ISPs to impair access to select Internet Content and, thereby, dramatically degrade the fundamental and distinguishing "pull" characteristic of the Internet. What today is the ultimate medium of consumer choice could easily devolve tomorrow into merely yet another mass media "push" outlet.

In this context, discrimination is impairment by BSPs or broadband ISPs of a consumer's access to Internet Content based on knowledge of the consumer's request for particular Internet Content. Amazon.com's June 17, 2002, filing cited several examples of such impairments. For instance, a consumer attempting to reach the website for Joe's Pizza might find access blocked or impaired by a BSP or broadband ISP that has a contract or other business relationship with David's Pizza, a competitor to Joe's. Because such impairments would have obvious value to entities such as David's Pizza, and in the absence of the discipline imposed by effective competition, BSPs and broadband ISPs would have clear business incentives and opportunities to impose such impairments, which could be of an overtly commercial nature (such as the insertion of

“pop-up” advertisements) or of a more technical nature (such as a slower delivery rate). Another example would be a consumer who, while accessing an online MP3 file, could be deluged with pop-up advertisements from competing online music sources or could find the download to be particularly slow, merely because she was not pulling the content from a source that had a business relationship with her BSP or broadband ISP.

In addition to these commercial concerns, of course, there are serious First Amendment problems with allowing intermediaries to block or filter, at their whim, political, religious, or other speech on the Internet. It is not hard to imagine, for example, how a BSP or broadband ISP might be pressured to block or impede access to sources of “hate speech” or information about a particular religious or political viewpoint, regardless of whether their individual subscribers want access to that content.

To be clear, however, ensuring that Internet Content not be impaired is completely different from requiring that a new service provider, such as a competitive local phone company, be given access to the facilities of an established provider, such as an incumbent phone company. Rather, the goal here is consumers’ unfettered ability to choose the source and nature of Internet Content. As the *Washington Post* succinctly illustrated, “Imagine the outcry if a local phone company started preventing customers from calling Lands’ End to place an order and redirected their calls to L.L. Bean, which had paid the phone company to be the exclusive purveyor of down jackets to its

customers.”<sup>3</sup> It is no more correct to claim that Internet Content sources free-ride on the facilities of BSPs and broadband ISPs than it would be to claim that Lands’ End somehow free-rides on the facilities of local phone companies. To the extent that transmitting content places a technical burden (and, thereby, an economic burden) on a BSP’s or broadband ISP’s facilities, the BSP’s and ISP’s customers, not the sources of information, compensate for the burden through subscriber fees.

Amazon.com is not suggesting that BSPs or broadband ISPs be barred from charging consumers different prices for different tiers of service. The “Gold Tier,” for example, could provide subscribers faster transfer speeds for a higher price than the “Silver Tier” or “Bronze Tier” service levels. Or the “C Plan” could offer random pop-up box advertisements in exchange for a discount off the rates for the “A Plan” or “B Plan” service levels, which might have fewer or no such pop-ups.

To reiterate, therefore, the impairments about which Amazon.com is concerned are only those that are introduced by BSPs or broadband ISPs based on their knowledge of the source or nature of particular Internet Content that a consumer seeks. Impairments that are wholly unintentional and/or unrelated (that is, unrelated to the Internet Content sought by the consumer) would not be reached by the proposed regulation. For example, the proposed rule would not cover situations where, beyond the control of BSPs or broadband ISPs, some websites appear to be slower because of the connections to that site or the equipment it employs. Also, the proposal would not cover the practice of

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<sup>3</sup> Sunday, November 24, 2002, page H3.

BSPs or broadband ISPs inserting paid advertising or other information, so long as it is unrelated to the source or nature of the Internet Content a consumer attempts to reach. Nor would the proposal reach private contractual arrangements between entities that are not BSPs or broadband ISPs, such as Google and Expedia.

The present letter follows the recent submission of the Coalition of Broadband Users and Innovators, in which a substantial number of consumer groups, industry associations, and individual companies collectively voiced similar concerns and requested that the FCC “assure that consumers and other Internet users continue to enjoy the unfettered ability to reach lawful content and services.”<sup>4</sup> In addition, some parties have described in the record of this proceeding how BSPs or broadband ISPs already are improperly impairing consumer access to Internet Content.<sup>5</sup>

But even if there were no examples of current discriminatory impairments, the FCC still should act now to preserve and protect consumers’ unfettered access to Internet Content. The Commission has taken pro-active steps to protect the public interest against potential abuses before discriminatory practices become entrenched. Indeed, there may be few examples of current impairments in today’s world of predominantly narrowband consumer Internet access through “dial-up” phone connections because access is both analog and highly competitive. Analog access makes it is very difficult for carriers (the

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<sup>4</sup> Letter dated November 18, 2002.

<sup>5</sup> See, e.g., the comments in this proceeding of the High Tech Broadband Coalition, dated July 17, 2002, and of the National Association of Broadcasters, dated August 6, 2002.

telephone companies) to intercept consumer information and then, based on that intercepted information, impose targeted impairments. At the same time, competitive access allows consumers to choose among tens of ISPs and, so, if a particular ISP imposes unacceptable impairments, consumers have many other options.

The foreseeable world of broadband consumer access, however, is much more hospitable than the present environment to discriminatory behavior by service providers. When communications are digital end-to-end, it is far easier for a BSP itself, using cable modem, DSL, or other technology, to intercept and impair the desired Internet Content. And effective inter-modal competition is unlikely for the vast majority of residential consumers anytime soon: even if two or more BSPs were available to a particular consumer, the substantial costs of changing providers and associated hardware/software prevent effective competition. (The situation so calls out for remedial action that Senators Boxer and Allen recently proposed draft legislation that they will pursue in the 108<sup>th</sup> Congress to jumpstart broadband wireless services in an attempt to spur some inter-modal competition.)<sup>6</sup> Finally, in the absence of safeguards, there may be as few as one broadband ISP available to each consumer via each BSP, so consumers will have few – if any – alternatives if a broadband ISP imposes discriminatory impairments.

In short, BSPs and broadband ISPs will have all the *incentives* (such as the Joe's Pizza and David's Pizza example); *tools* (because the transmission is all digital); and

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<sup>6</sup> See Terry Lane, *Senators to Pursue Alternatives for Broadband Deployment*, Comm. Daily, Nov. 21, 2002.

*market conditions* (lack of effective competition among BSPs and broadband ISPs) to dramatically affect the character of the Internet as consumers have come to know it, regardless of whether such activities have yet commenced. If the government fails to take appropriate steps now, it is highly likely that BSPs and broadband ISPs will, based on their easily obtainable knowledge of the source and nature of the Internet Content sought by an individual consumer, impair delivery of that content. Accordingly, even if current examples of such impairments did not exist, sound public policy would compel the FCC to act against this highly likely harm to consumers.

### **FCC Jurisdiction**

The FCC has a clear statutory mandate to ensure broadband residential consumers' access to the Internet Content of their choosing. Further, as documented in Appendix A, the Commission has the authority to adopt a rule that would (1) bar BSPs from impairing residential consumer access and (2) require them either to impose the same requirement on broadband ISPs or to open their networks to multiple, unaffiliated and mutually independent ISPs.

### **Proposed Rule**

In order to protect broadband residential consumers' access to Internet Content without discriminatory impairment by intermediaries, Amazon.com respectfully suggests that the FCC propose and adopt a rule similar to the one attached as Appendix B. This rule would bar, under all circumstances, BSPs themselves from impairing consumer access to Internet Content based in whole or in part on the BSP's knowledge of the

source or nature of a consumer's request for that content. However, the rule would give BSPs the option of allowing any ISP, affiliated or otherwise, to impose impairments so long as the BSP also opens its network to three or more unaffiliated and mutually independent ISPs pursuant to contractual arrangements that do not require such impairments. If a BSP chooses not to open its network to other ISPs, then it would be obliged to require any ISP not to impair consumer access in the same way the BSP itself is barred from impairing access.

The proposed rule would not constitute FCC regulation of ISPs or the Internet. Amazon.com, like most companies whose customers rely on the Internet, generally opposes ISP and Internet regulation. Residential consumer access to the Internet traditionally has been regulated in various ways; we urge only that limited regulation be maintained as the technology evolves.

Nor would our proposed rule mandate "open access," which would require BSPs to open their facilities to several ISPs, such as illustrated in Figure 2 in Appendix C. Proponents of mandatory open access believe it will result in higher quality and/or less expensive ISP service. While this may be an important goal in itself, Amazon.com's focus is on the far more important and fundamental goal of maintaining unfettered consumer access to Internet Content. (Consumers typically choose their ISP service only once every one, two, or three years, but they choose their Internet Content tens or hundreds of times a day!) Under our proposed rule, BSPs would have the fair choice of

either requiring broadband ISPs to forego discrimination among Internet Content or opening their facilities to multiple unaffiliated ISPs.

Lastly, proposing this rule is not an attempt to regulate cable as a common carrier. Amazon.com certainly is not suggesting that BSPs be subject to rate regulation, entry/exit restrictions, universal service fees, and the like.

On behalf of our customers and company, Amazon.com believes that as the Commission considers the appropriate regulatory treatment of BSPs in a variety of proceedings, it should preserve residential consumers' longstanding ability to access Internet Content without discriminatory impairment by intermediaries. The FCC has the mandate to protect consumers in this way, and Amazon.com has suggested one possible rule that would provide reasonable and unintrusive means of accomplishing this goal. We therefore respectfully request that the Commission propose and adopt a rule like the one we suggest herein.

Thank you very much for the opportunity to participate in this proceeding. Please address questions to the undersigned.

Ms. Marlene H. Dortch

*December 2, 2002*

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Respectfully submitted,

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Ms. Susan Eid  
Mr. Chris Libertelli  
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Ms. Stacy Robinson  
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Ms. Alexis Johns  
Mr. Dan Gonzalez  
Ms. Catherine Bohigian  
Mr. Kenneth Ferree  
Mr. Kyle Dixon  
Mr. William Maher  
Ms. Jane Mago  
Mr. John Rogovin  
Dr. Robert Pepper  
Docket Nos. 02-33, 00-185, 98-10, 95-20

**ANALYSIS OF THE FCC’S JURISDICTION TO PRESERVE UNFETTERED  
CONSUMER ACCESS TO INTERNET SERVICES**

Amazon.com has asked us to assess the authority of the Federal Communications Commission to adopt a rule to ensure that broadband service providers, including cable operators and ILECs, and ISPs, do not anticompetitively block consumer access to the information, products, and services made available on the Internet by myriad independent websites.

Amazon.com is proposing a rule that would be applicable to all broadband platform providers – cable, telephone company, satellite or wireless – that would preserve consumers’ continuing access to the range of choices they have come to expect from sites made available to them through the Internet. We conclude that the Commission has the requisite authority to adopt a rule along the lines proposed by Amazon.com.

**I. THE FCC POSSESSES ANCILLARY JURISDICTION SUFFICIENT TO IMPOSE NON-IMPAIRMENT/NONDISCRIMINATION REQUIREMENTS ON BROADBAND SERVICE PROVIDERS.**

Applicable Title I provisions – The Commission has determined that cable modem service is an interstate information service and has tentatively concluded that wireline broadband service is as well.<sup>1</sup> In Title I of the Communications Act, Congress granted the Commission

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<sup>1</sup> 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*, FCC 02-77, ¶ 33 (2002) (“*Cable Modem Notice*”); *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; 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, Notice of Proposed Rulemaking*, FCC 02-42, ¶ 16 (2002) (“*Wireline Broadband Notice*”). Although the Commission has not addressed how it would classify broadband services delivered over other platforms, such as wireless or satellite, it has indicated an interest in adopting technology-neutral broadband policies and could well decide that these, too, are information services. See *Cable Modem Notice* ¶ 6 (“We strive to develop an analytical approach that is, to the extent possible, consistent across multiple platforms.”); *Wireline Broadband Notice* ¶ 6; Roger Golden & Marc Berger, *Broadband and the Current Debate in Washington*, *Broadband Networking News*, May 7, 2002 (“The FCC has consistently stated that broadband regulations

broad ancillary jurisdiction to regulate interstate communications, including new technologies as they evolve. The source of the Commission’s authority is located in various provisions of Title I. In Section 1 of the Act, Congress established the Commission to “make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.”<sup>2</sup> Section 2 gives the Commission authority over “all persons engaged within the United States in providing such service” and over “all interstate and foreign communication by wire or radio,”<sup>3</sup> which “include[s] all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission.”<sup>4</sup> Section 4(i) grants the Commission authority to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”<sup>5</sup> The Commission has relied on one or more of these provisions as the basis for its ancillary authority over interstate communications services.<sup>6</sup> The Act empowers it to follow the same course here.

*Title I precedents* – The FCC’s ancillary jurisdiction is well-established and has been interpreted broadly. The *Cable Modem Notice* itself observes that “[f]ederal courts have

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(if any) must not be drafted in terms of a specific technology and must not favor any current (or future) providers of broadband services or applications.”)

<sup>2</sup> 47 U.S.C. § 151. The Commission recognized that Section 1 could serve as the basis for exercise of its ancillary jurisdiction in the *Notice of Proposed Rulemaking* in the cable broadband proceeding. See *Cable Modem Notice* ¶ 79.

<sup>3</sup> 47 U.S.C. § 152(a).

<sup>4</sup> 47 U.S.C. § 153(52). The Act defines “communication by wire” as “the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between points of origin and reception of transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission.” *Id.*

<sup>5</sup> 47 U.S.C. § 154(i).

<sup>6</sup> The Communications Act grants the Commission authority to regulate a range of communications services, including telecommunications services, cable services, and information services. Information services are a subset of communications services that may only be regulated pursuant to the Commission’s Title I jurisdiction.

long recognized the Commission’s authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority.”<sup>7</sup> The Supreme Court first upheld the Commission’s exercise of its ancillary jurisdiction in *United States v. Southwestern Cable Co.*, concluding that the Commission could regulate emerging cable television service under its ancillary authority, notwithstanding the absence of a specific statutory mandate.<sup>8</sup> The D.C. Circuit has similarly found it “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.”<sup>9</sup> Exercise of the Commission’s ancillary jurisdiction is justified because “the Act was designed to provide the Commission with sufficiently elastic powers to readily accommodate new developments in the field of communications” to address technological advances that Congress could not have been expected to anticipate when drafting statutory language.<sup>10</sup>

The Commission used its ancillary jurisdiction to extend needed regulation to new communications services or previously unregulated facets of communications services. For example, the Commission:

- adopted requirements that particular services available over the telephone network be accessible to persons with disabilities;<sup>11</sup>

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<sup>7</sup> *Cable Modem Notice* ¶ 75.

<sup>8</sup> See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

<sup>9</sup> *Computer & Communications Industry Ass’n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982).

<sup>10</sup> *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC 2d 384, 432 (1980) (“*Computer IP*”); see also *Southwestern Cable*, 392 U.S. at 172 (explaining that “Congress could not in 1934 have foreseen the development of” advanced communications systems and services).

<sup>11</sup> See *In re* Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, *Report*

- reinstated syndicated exclusivity rules for cable operators;<sup>12</sup>
- regulated customer premises equipment;<sup>13</sup>
- created the universal service fund;<sup>14</sup>
- imposed a multiple access requirement on AOL Time Warner as a condition of approving the merger;<sup>15</sup>
- imposed a nondiscrimination requirement with respect to advanced high-speed Instant Messaging services on AOL Time Warner as a condition of approving the merger;<sup>16</sup> and
- extended the over-the-air reception devices regulatory regime to antennas used to transmit or receive fixed wireless signals.<sup>17</sup>

The common thread in each of these situations is that the Commission exercised its jurisdiction over subject matter and issues that it had not previously regulated and where the Communications Act did not expressly and specifically authorize the Commission to take

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*and Order and Further Notice of Inquiry*, 16 FCC Rcd 6417, 6455 (1999) (“We assert ancillary jurisdiction to extend [Section 255] accessibility requirements to the providers of voicemail and interactive menu service and to the manufacturers of equipment that perform those functions.”).

<sup>12</sup> See *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989).

<sup>13</sup> See *Computer II*, 77 FCC 2d at 453-54. The Commission recognized that it may exercise its ancillary jurisdiction to assure the nationwide availability of wire communications services at reasonable prices under Section 2 of the Act to protect or promote a statutory purpose. See *id.* at 430-34, 450-57.

<sup>14</sup> See *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (1988).

<sup>15</sup> See *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order*, 16 FCC Rcd 6547, 6569-70 (2001) (“*AOL Time Warner Order*”).

<sup>16</sup> See *id.* at 6610.

<sup>17</sup> See *In re Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission’s Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, 15 FCC Rcd 22983, 23029 (2000) (“*OTARD Extension Order*”).

action.<sup>18</sup> Thus, when the Commission exercised its ancillary jurisdiction to regulate newly emerging cable television services in the mid-1960s, it did so years before Congress adopted a statute expressly regulating these services. Similarly, although Congress had directed the Commission to make telecommunications equipment accessible to persons with disabilities, the Commission used its ancillary authority to require that equipment and service providers also make available to the disabled newer, more advanced services, such as voice mail and interactive menu services. And although Congress had directed the Commission to regulate over-the-air reception devices, it was the Commission that, after studying the issue, exercised its ancillary authority to extend regulations to antennas used to transmit or receive fixed wireless signals.

*Appropriateness of Title I authority here* – Assertion of the Commission’s ancillary jurisdiction over broadband services would be consistent with the precedents established on these other occasions. It would be another application of the Commission’s “long-standing policy of promoting competition in the delivery of spectrum-based communications services and . . . implement[ing] numerous measures to foster entry and ensure availability of competitive choices in the provisioning of such services.”<sup>19</sup> As Chairman Powell explained in the *Cable Modem Notice*: “The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I. That provision has been invoked

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<sup>18</sup> Recently, the D.C. Circuit determined that the Commission lacked ancillary authority to adopt video description rules. *See Motion Picture Ass’n of America, Inc. v. FCC*, 2002 WL 31487186, \*2 (D.C. Cir. Nov. 8, 2002). The court’s decision was tied to the fact that the rules regulated program content, thereby implicating First Amendment issues. *See id.* at \*9 (“To avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content.”). Because the rule proposed by Amazon.com does not involve regulation of content, the *Motion Picture Association* decision would not apply.

<sup>19</sup> *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*, FCC 02-284, ¶ 87 (rel. Oct. 18, 2002) (“*EchoStar/DirecTV Order*”).

consistently by the Commission to guard against public interest harms and anti-competitive results.”<sup>20</sup>

The Supreme Court explained as early as 1943 that “[t]he substantial discretion generally allowed the FCC in determining both what and how it can properly regulate, is often attributed to the highly complex and rapidly expanding nature of communications technology. Because Congress could neither foresee nor easily comprehend the fast-moving developments in the field, ‘it gave the Commission not niggardly but expansive powers.’”<sup>21</sup> These powers, as Chairman Powell aptly observed, easily extend to protecting consumer access to broadband services. They also give the Commission discretion to determine the most appropriate means of ensuring such access, including a rule or rules that prevent impairment of user access to Internet information, products, and services.

The particular rule proposed by Amazon.com is non-intrusive and limited. It gives the broadband platform provider two options – to assure that ISPs observe certain neutral and objective non-impairment principles or to make available at least three independent ISPs to its subscribers. The proposal is, therefore, a modest exercise of the Commission’s Title I powers.

*Need for action now* – The *Cable Modem Notice* asked whether “the threat that subscriber access to Internet content or services could be blocked or impaired . . . [is] sufficient to justify regulatory intervention at this time,”<sup>22</sup> noting that the Commission was unaware of any allegations that cable operators have denied or impaired access to unaffiliated Internet content.

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<sup>20</sup> *Cable Modem Notice*, Separate Statement of Chairman Michael K. Powell 70.

<sup>21</sup> *NARUC v. FCC*, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976) (quoting *NBC v. United States*, 319 U.S. 190, 219 (1943)).

<sup>22</sup> *Cable Modem Notice* ¶ 87.

But adoption of a non-impairment standard would be appropriate at this time for two reasons. First, it is well established that the Commission may adopt measures on the basis of the probability that entities will engage in anticompetitive behavior. The Commission has long recognized that “to promote the policies of the Communications Act, [it] may ‘plan in advance of foreseeable events instead of waiting to react to them.’”<sup>23</sup> It has been cognizant of “the danger of inaction where the window of opportunity to preserve competition and protect the other policies of the Communications Act may be narrow because the markets are changing rapidly.”<sup>24</sup> It has, for example, imposed an instant messaging condition on the merger of two communications companies because the transfer of control “substantially increases the probability” of discrimination.<sup>25</sup> Proactive steps by the Commission are particularly justified here where an incumbent provider’s control of the information pipe enables it to act as a gatekeeper and gives it the ability to materially impair consumer access to information, content, and services available on the Internet in order to benefit websites with which they will or already have ownership or contractual relationships.<sup>26</sup> Anticipatory regulation is appropriate for broadband as in the case of other nascent technologies and services that the Commission has sought to shield from anti-competitive practices.

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<sup>23</sup> *AOL Time Warner Order*, 16 FCC Rcd at 6611 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)); *In re Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, *First Report and Order*, 38 FCC 683, 701 (1965); see also *AOL Time Warner Order* at 6603 (imposing an Instant Messaging nondiscrimination condition on the merger of AOL and Time Warner because the transfer of control “substantially increases the probability that AOL’s dominance in the narrowband text-messaging world will persist in the world of high-speed interactive services”) (emphasis added).

<sup>24</sup> *AOL Time Warner Order*, 16 FCC Rcd at 6604.

<sup>25</sup> *Id.* at 6603.

<sup>26</sup> Where the broadband service provider is affiliated (by ownership, contract, or otherwise), it also has an incentive to engage in discriminatory practices.

Second, there are already on the record in this proceeding various examples of how broadband providers are today impairing user access to Internet information, products, and services.<sup>27</sup> These examples were submitted after the observation in the *Cable Modem Notice* that there had not been complaints in this area. Broadband service providers are restricting the types of data subscribers may send and receive, imposing additional charges for sending or receiving particular content, and restricting what equipment may be attached to the network.<sup>28</sup> They are also reserving the right to impose further discriminatory restrictions in the future.<sup>29</sup> These actions indicate broadband service providers' willingness to use their bottleneck control to impair user access to the Internet. For these reasons the Commission is fully justified, using its ancillary authority, to adopt a rule to ensure user access to broadband services.

## **II. EXERCISE OF ANCILLARY JURISDICTION IS APPROPRIATE FOR THE FCC TO PERFORM ITS EXPRESS STATUTORY OBLIGATIONS.**

The Commission's authority to exercise its ancillary jurisdiction is not, of course, unlimited. Instead, "[t]he principal limitation upon, and guide for, the exercise of these additional powers which Congress has imparted to this agency is that the Commission regulation must be directed at protecting or promoting a statutory purpose."<sup>30</sup> Although the Commission's ability to exercise its ancillary jurisdiction is not limitless,<sup>31</sup> it retains "broad discretion so long as

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<sup>27</sup> See, e.g., Comments of the Center for Digital Democracy, Consumer Federation of America, Media Access Project, Association of Independent Video and Filmmakers, National Alliance of Media Arts and Culture, and the United Church of Christ, Office of Communication, Inc. in CS Docket No. 02-52, at 11-13 (June 17, 2002); Comments of the High Tech Broadband Coalition in CC Docket No. 02-52, at 10-13 (June 17, 2002); Reply Comments of the National Association of Broadcasters in GN Docket No. 00-185 & CS Docket No. 02-52, at 6-16 (Aug. 6, 2002).

<sup>28</sup> See HTBC Comments at 10-12.

<sup>29</sup> See *id.* at 12-13.

<sup>30</sup> *Computer II*, 77 FCC 2d at 433.

<sup>31</sup> In this respect, it is noteworthy that Amazon.com's regulatory proposal would give broadband service providers the choice of requiring that Internet service providers abide by non-impairment principles or make available three independent service providers to its subscribers. It is thus a limited and tailored rule.

its actions further the legislative purposes for which the Commission was created and are not contrary to the basic statutory scheme.”<sup>32</sup> In this case the objective is preserving the public’s access to Internet-based information, products, and services, free from impairments imposed by discriminatory practices. That objective, in turn, is supported by a number of relevant statutory provisions, several of which the Commission’s *Cable Modem Notice* identified as providing adequate basis for its exercising ancillary jurisdiction.<sup>33</sup>

Section 706 of the Act – A key statutory objective that supports the exercise of the Commission’s Title I ancillary authority in this instance is Section 706 of the Telecommunications Act of 1996. It charges the Commission with “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by . . . regulatory forbearance, measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment.”<sup>34</sup> The Commission has held that the principal purpose of this provision “is to facilitate the use of advanced services, of which residential high-speed Internet access services are one kind.”<sup>35</sup> Thus, the Commission has, for example, determined that Section 706 provided a statutory basis for exercise of its ancillary jurisdiction to extend protections for over-the-air reception devices to antennas used to transmit or receive fixed wireless signals.<sup>36</sup> The

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<sup>32</sup> *In re* Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board, *Decision and Order*, 96 FCC 2d 781, 787 n.15 (1984).

<sup>33</sup> See *Cable Modem Notice* ¶ 79 (“Other statutory grounds might include the goals stated in section 230(b) of the Act, the Title VI goal of assuring ‘that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,’ and section 706 of the 1996 Act.”) (footnotes omitted).

<sup>34</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153 (codified at 47 U.S.C. § 157 nt).

<sup>35</sup> *AOL Time Warner Order*, 16 FCC Rcd at 6569-70.

<sup>36</sup> See *OTARD Extension Order*, 15 FCC Rcd at 23030.

Commission also found that Section 706, as well as Section 230, justified imposing a multiple access requirement in the AOL Time Warner merger, since discrimination by the merged entity against unaffiliated ISPs would “thwart the deployment of advanced telecommunications capability to all Americans by limiting choice in the realm of residential high-speed Internet access services and, potentially, by threatening the survival of ISPs unaffiliated with AOL Time Warner as consumers migrate from narrowband to high-speed services.”<sup>37</sup> The statutory mandate to “encourag[e] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” also provides clear authority for the Commission to protect consumers’ ability to access their choice of Internet-based content, services, and applications.

Section 230 of the Act – Modest regulation ensuring Internet-consumer choice would also be justified by Sections 230(b)(1) and (2) of the Communications Act. Section 230(b)(1) establishes a national policy of “promot[ing] the continued development of the Internet and other interactive computer services and other interactive media,”<sup>38</sup> and Section 230(b)(2) supports “preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.”<sup>39</sup> While Section 230(b)(2) goes on to state that the market for Internet services should be “unfettered by Federal and State regulation,”<sup>40</sup> this does not mean that the Commission is prevented from adopting limited safeguards to preserve *and foster* unfettered consumer choice with respect to Internet sites, which is the characteristic of the Internet that made possible its extraordinary growth and unlocked its unparalleled potential

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<sup>37</sup> *AOL Time Warner Order*, 16 FCC Rcd at 6570-71.

<sup>38</sup> 47 U.S.C. § 230(b)(1).

<sup>39</sup> 47 U.S.C. § 230(b)(2).

<sup>40</sup> *Id.*

for providing benefits to the public. Thus, the regulatory approach proposed by Amazon.com would not “fetter” the Internet market as prohibited by Section 230(b)(2) but would “promote [its] continued development.”

An example of where the Commission followed this same logic is provided by its recent decisions to require reciprocal compensation of carriers for ISP-bound traffic<sup>41</sup> and to change access charge practices. There, too, the Commission relied on Section 230 as justifying regulations intended to preserve competition and “the dynamic market for Internet-related services.”<sup>42</sup> Similarly, the Commission relied on Section 230(b)(2) in exercising its ancillary jurisdiction to impose a multiple access requirement on cable operator AOL Time Warner, explaining that it “would imperil the continued existence of a vibrant and competitive free market for the development of the Internet” to give the cable operator “the ability and the incentive to discriminate against unaffiliated ISPs on its own cable platform.”<sup>43</sup> Because nondiscriminatory access to Internet content, services, and applications will preserve for consumers “the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,” the Commission is empowered with sufficient ancillary jurisdiction to take the approach urged by Amazon.com.

Title VI of the Act – Title VI of the Communications Act is another basis for the Commission’s exercising ancillary jurisdiction to impose targeted consumer-choice regulations under these circumstances. The purpose of Title VI is to “assure that cable communications

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<sup>41</sup> See *In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689, 3693 (1999).

<sup>42</sup> *In re* Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges, *First Report and Order*, 12 FCC Rcd 15982, 16133 (1997).

<sup>43</sup> *AOL Time Warner Order*, 16 FCC Rcd at 6570.

provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”<sup>44</sup> Although Section 521, which is part of Title VI, is specific to services delivered through the cable pipe, which would include cable modem Internet access service, it is also consistent with other, broader provisions of the Act that favor a diversity of voices<sup>45</sup> and that express the government’s substantial interest in promoting a diversity of views through multiple technology media.<sup>46</sup> Broadband providers that discriminate with respect to, or block consumers’ access to, Internet content, services, and applications would deny consumers access to “the widest possible diversity of information sources” and impede a “diversity of media voices, vigorous economic competition, [and] technological advancement.”<sup>47</sup> Accordingly, the Commission may carry out its statutory mandate by adopting a rule to prevent impairment to discrimination in the public’s access to Internet sites.

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For the reasons described above, we conclude that the Commission’s ancillary jurisdiction under Title I of the Communications Act and other provisions of the Act provide it with ample authority to adopt a rule to combat impairments to consumer access to Internet sites, including a rule of the kind proposed by Amazon.com.

Covington & Burling

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<sup>44</sup> 47 U.S.C. § 521.

<sup>45</sup> See 47 U.S.C. § 257(b).

<sup>46</sup> See 47 U.S.C. § 521 nt.

<sup>47</sup> 47 U.S.C. § 257(b); see also Comments of the American Civil Liberties Union in CS Docket No. 02-52, at 2 (June 17, 2002) (“The tremendous growth and success of the Internet is a result of the lack of centralized control over how the network is used. No company, individual, or institution has the power to decide what applications are allowed to run by users at the ends of the network, what kinds of data can be moved through the network, or whose data moves faster.”); Reply Comments of the Digital Media Association in CS Docket No. 02-52, at 3 (Aug. 6, 2002) (“If consumer choice of information, applications or devices is limited by broadband providers, the most compelling aspects of the Internet will be harmed, and competition in the greatest information marketplace heretofore seen will be severely diminished.”).

Sec. ##.## Impairment of Access to Internet Content

- a) No provider, by whatever technology, of residential broadband services (“Broadband Service Provider”), as defined in [x], shall impair any user’s lawful access to Internet information, products, and services (“Internet Content”) based in whole or in part on the Broadband Service Provider’s knowledge of the user’s request for particular Internet Content, including but not limited to knowledge of the source or nature of such requested Internet Content.
- b) A Broadband Service Provider shall either:
  - (1) Require that any Internet Service Provider (“ISP”) not impair any user’s lawful access to Internet Content based in whole or in part on the ISP’s knowledge of the user’s request for particular Internet Content, including but not limited to knowledge of the source or nature of such requested Internet Content; or
  - (2) Make available to any residential subscriber at least three unaffiliated and mutually independent ISPs over the Broadband Service Provider’s facilities on terms and conditions that, taken as a whole, are no less favorable than those the Broadband Service Provider makes available to affiliated ISPs.
- c) For purposes of this Section, “impair” shall mean:
  - (1) To interfere with a user’s lawful access to requested Internet Content by blocking such content; delaying it; or degrading its other characteristics, including impairing the functionality or features of the Internet source;
  - (2) To inject other content:
    - (A) To the complete exclusion of the requested Internet Content, by instead sending or causing to have sent random content; specific content; content intended to imitate the requested Internet Content; or any other content beyond that which would be sent under normal technical circumstances; or
    - (B) In addition to the requested Internet Content by contemporaneously sending or causing to be sent any other content, including but not limited to HTML files as “frames” or “pop-up boxes,” beyond that requested by the user and other than that which would be sent under normal technical circumstances; or
  - (3) To alter in any way the functionality of an end user’s local software or hardware, without the end user’s prior, opt-in written (including electronically written) consent.
- d) A Broadband Service Provider or ISP shall not impair Internet Content if it provides improved services, such as caching, to a limited number of Internet Content sources.

Diagrams

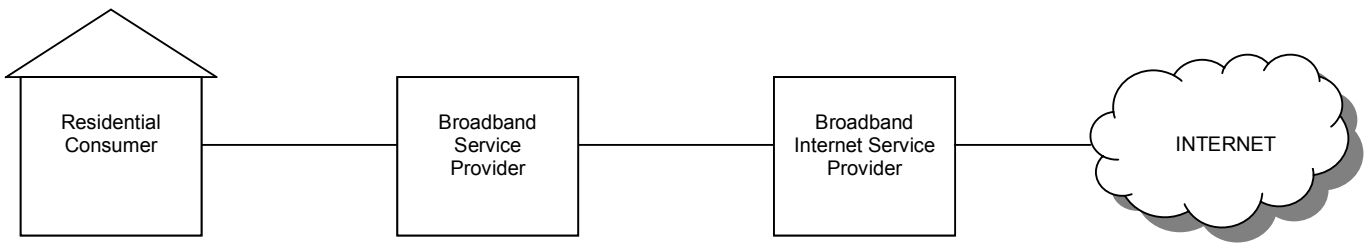


Figure 1: Residential Access with One Broadband ISP

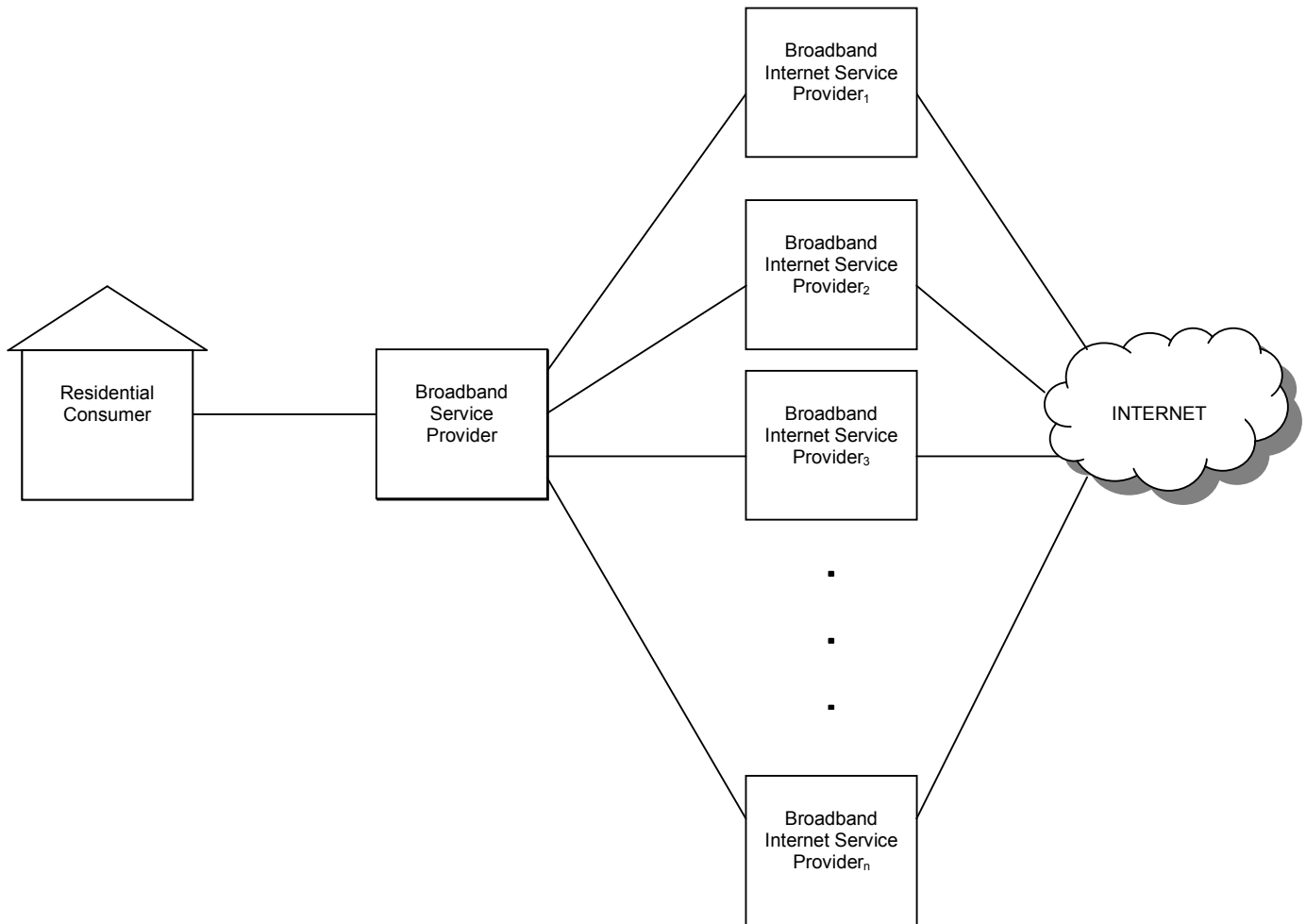


Figure 2: Residential Access with Multiple ISPs