

## EX PARTE FILING

July 25, 2008

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

RE: In the Matter of Broadband Industry Practices, WC Docket No. 07-52

Dear Ms. Dortch:

In its filing yesterday, the National Cable and Telecommunications Association (NCTA) attempted to analogize the activities of cable operators in blocking certain peer-to-peer Internet traffic using their public networks to the policies of universities to manage their private, on-campus telecommunications networks. The purpose of this letter is to clarify that college and universities' networks, which are private networks similar to intracorporate networks operated by large businesses for their own internal purposes, have very different legal obligations and purposes than the public broadband networks operated by cable operators serving the general public. And even if the public cable broadband networks were comparable to universities' private networks, the chart contained in NCTA's filing does not support the argument that universities have engaged in the same type of blocking behavior of certain cable operators.

EDUCAUSE is a nonprofit association whose mission is to advance higher education by promoting the intelligent use of information technology. Our current membership comprises more than 2,200 colleges, universities, and educational organizations, including 250 corporations, with over 17,000 active members. It is EDUCAUSE's belief that affordable and open access to high-speed Internet connectivity, regardless of the technology being deployed, is essential for higher education to provide faculty, researchers, and students with the capacity to access information and collaborate to advance learning, scholarship and research.

First, in its filing, NCTA suggests that regulation "must apply equally to all providers" and that any network management rule in this proceeding "would surely sweep in common management practices of the top universities." EDUCAUSE doubts that NCTA intended this comment to be a serious suggestion that the FCC should expand the scope of its regulatory authority to apply to the thousands of private networks operated by universities across the country. Nevertheless, EDUCAUSE takes this opportunity to remind the Commission that on-campus telecommunications networks operated by universities have long been considered "private" networks that do not have the same legal



obligations as the "public" networks at issue in this proceeding. This legal distinction has been recognized in the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001-1010 ("CALEA") and in the Telecommunications Act of 1996 (which defines "telecommunications services" as those offered "to the public").<sup>1</sup>

In fact, universities' networks are no different than other private networks. Universities operate their networks to support the needs of the university students, faculty and staff. Universities do not offer service to the general public and do not offer service in competition to the public providers. Were the FCC to extend its regulation to private networks, its rules would cover the hundreds of thousands of private networks operated by state and local governments, public safety and national security authorities, and intracorporate networks. There would be no policy justification or legal basis for such an expansion of the FCC's authority.

The FCC has long recognized that private networks are intended for the use of a closed class of users: "Other networks, like those built and maintained by corporations for their internal use, are private in the sense that access to the network may be restricted to a particular class of users, often the corporation's employees." There is nothing in the law that requires operators of private networks to operate in the same manner as public network operators.<sup>3</sup> Thus, the FCC should reject NCTA's implication that the FCC should apply any of its network management rules or enforcement actions in this proceeding to the private networks operated by colleges and universities, state and local governments and corporations across America.4

<sup>&</sup>lt;sup>1</sup> For example, in Andersen Consulting LLP v. UOP and Bickel & Brewer (991 F. Supp. 1041, Case No. 97 C 5501), the court held that the phrase "to the public" in the Electronic Communications Privacy Act meant providing services "to the community at large", noting further that a corporation's "internal e-mail system is separate from the Internet". Thus, for example, Comcast's own internal corporate network is easily distinguishable from the network it sells to the public.

<sup>&</sup>lt;sup>2</sup> In the Matter of Inquiry concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, released, August 10, 2001, para. 2.

<sup>&</sup>lt;sup>3</sup> For instance, there is no suggestion in the FCC's Policy Statement that the "four principles" should apply to the networks of colleges and universities. See, In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, WC Docket No. 02-33, Policy Statement, released Sept. 23, 2005.

<sup>&</sup>lt;sup>4</sup> To make this point even clearer, were the FCC to attempt to regulate private networks, it would be no different than regulating use of a family's use of telecommunications or broadband services in the home.



Second, the NCTA filing suggests that universities engage in a wide variety of network management techniques and that cable operators should be entitled to the same flexibility in managing their networks. In addition to the legal and policy reasons for differentiating between college and universities' private networks and cable operators' public broadband networks discussed above, the attempted analogy fails for another reason. The network management activities cited by NCTA are very different from the type of blocking that some cable operators have practiced. Even though universities have the legal right to block traffic, the evidence submitted by NCTA does not demonstrate that they are doing so. Most of the language cited by NCTA consists of the universities' "policies" regarding use of their networks. This does not necessarily mean that the universities have taken the specific action of "blocking traffic" as a way to implement that policy. In fact, universities often attempt to identify individual users who may be causing congestion. Many of the policies have to do with the control of equipment and activities of specific employees or students. This is a far different type of network management than blocking all traffic using a specific protocol.

Furthermore, it appears that NCTA pulled some language off the universities' web sites that may be taken out of context. According to a story in Ars-Technica,<sup>5</sup> some of the policies cited by NCTA may concern sensitive data that is not related to network congestion. Other policies may relate to connections with off-campus networks, not oncampus networks. While EDUCAUSE has not had an opportunity to review each of these members' usage policies, the limited review of this information suggests that the FCC cannot and should not take these selected quotes as evidence of blocking.

We appreciate the opportunity to present these views to the FCC.

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Sincerely,

Mark Luker Vice President

**EDUCAUSE** 

<sup>&</sup>lt;sup>5</sup> http://arstechnica.com/news.ars/post/20080724-big-cable-fcc-internet-policy-should-apply-to-collegestoo.html.