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January 10, 2001

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
Room TW-B204
445 12th St., S.W.
Washington, D.C. 20554

RE: EarthLink, Inc. Reply Comments in GN Docket No. 00-185

Dear Ms. Salas:

Enclosed are one original and four copies of the Reply Comments of EarthLink, Inc. in the above-referenced matter.

A 3.5 inch diskette will be submitted to Janice Myles, Common Carrier Bureau.

Copies have also been provided to the parties listed below.

Respectfully,

Earl W. Comstock
John W. Butler

cc: Johanna Mikes, Common Carrier Bureau
Christopher Libertelli, Common Carrier Bureau
Carl Kandutsch, Cable Services Bureau
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In the Matter of

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	))))	GN Docket No. 00-185

REPLY COMMENTS OF EARTHLINK, INC.

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EXECUTIVE SUMMARY

EarthLink, Inc. ("EarthLink") is the nation's second largest Internet Service Provider (ISP), and the largest ISP that is not under current or proposed common ownership with a cable company. Especially in light of the recent actions by the Federal Trade Commission to impose conditions on the AOL-Time Warner merger that are intended to help independent ISPs gain access to Time Warner cable systems used to provide transport services for high-speed Internet access offerings, it is apparent that the Commission needs to act now to clarify that such cable transport services – referred to in this proceeding as cable modem services – are in fact telecommunications services under the Communications Act when used by the cable operator or its affiliate to indiscriminately offer Internet access and other information services to end users.

1. The Communications Act Does Not Allow Cable Operators to Provide Transmission for Internet Access Under Two Separate Regulatory Regimes.

Perhaps the most striking fact about the comments submitted by cable operators in this proceeding is that none of them bring to the Commission's attention the fact that those very same cable operators have actively sought and received certification as competitive local exchange carriers (CLECs) in numerous states throughout the nation. Cable operators went to court in *City of Dallas, Texas v. Federal Communications Commission*, 165 F.3d 341 (5th Cir. 1999) to assert their rights as CLECs, and the court agreed that it was clear that Congress intended and understood that cable operators could provide both cable service and local exchange service using cable facilities.

Time Warner has been certificated to provide competitive local exchange service using its cable facilities in Ohio since 1993, and has been certificated as a CLEC in at least nine other states since then. Cox has been certificated as a CLEC in at least nine states, and TCI in at least three. In each of their applications, these cable operators assured the State commissions that they had the necessary technical, financial, and managerial experience to provide the full range of local exchange services.

Notwithstanding their assurances to State commissions, the cable industry claims in its comments that if the Commission were to treat the cable operators as CLECs by requiring them to provide the underlying cable modem transmission service to unaffiliated ISPs seeking to provide information services to subscribers reached by cable facilities, this would be forcing them into a new line of business in which they have no experience. Obviously, nothing could be further from the truth.

Congress, the courts, and the Commission have all found that equivalent services should be regulated under the same statutory regime. Indeed, the Congress went to great lengths in the Cable Communications Policy Act of 1984 (the "Cable Act") to draw a clear line between those services that were cable services, and therefore exempt from common carrier requirements under Title II of the Communications Act, and those that were not. All of the issues raised in this *Notice of Inquiry* (*"NOI"*) boil down to this simple question: Should the same functional service – in this case the transmission of Internet access and other information services – be able to be provided to end-users over the same facility under two different regulatory regimes, the choice of which depends solely on what the facilities-based provider of that transmission chooses to call

the service? The Communications Act and Commission precedent do not support such a result, and the Commission should end this special privilege for cable operators immediately by acknowledging that cable modem service is a telecommunications service subject to Title II of the Act.

2. Cable Modem Services Are Not "Cable Services" Within The Meaning Of The Communications Act.

Cable operators continue to argue that the cable-based Internet services are "cable services" under the Act. Although the cable industry appears to have largely abandoned its position that the 1996 addition of the words "or use" to the definition of "cable service" expanded the scope of "cable service" to include Internet access, the industry offers other arguments in support of its position that such service is a "cable service" under the Act. Most notably, AT&T argues that it "makes available to all subscribers generally" all information on the public Internet, and that it is thus providing an "other programming service." In addition to the fact that the Commission has already dismissed this argument in its *amicus* brief to the Ninth Circuit Court of Appeals in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), the argument ignores the fact that Congress made it clear in the legislative history of the Cable Act that whether a particular service is in fact a "cable service" depends on the nature of the information provided by that service, not the means by which it is transmitted. Inasmuch as AT&T cannot even describe the nature of most of the information that it claims to "make available" to its subscribers, AT&T's argument must fail. The argument must also fail because it is based in the end on the way in which information is transmitted, not the nature of the service offered.

3. Cable Modem Services Are Common Carrier Telecommunications Services That Must Be Offered On Nondiscriminatory Terms To ISPs.

The Commission's longstanding decisions in *Computer II* and the *Frame Relay Order* are unequivocal in stating that, where a facilities-based information service provider uses its own transmission facilities to deliver an information service to the public, that facilities-based provider must offer the transmission capacity used to carry its information services to other information services providers (e.g., ISPs) on the same terms that it provides that transmission to itself. Because cable operators are undeniably using their own transmission facilities to deliver Internet access and other information services to millions of their subscribers, *Computer II* unambiguously requires those cable operators to make their transmission facilities available to other ISPs through nondiscriminatory resale.

The cable industry attempts to avoid its *Computer II* obligations by arguing that it is not offering a common carrier service. The industry's first argument in support of its purported private carrier status is that it is not offering transmission services to the public at all. This argument hinges on the assertion that when an information service and its underlying transmission service are bundled and offered together for a single price, the information service "contaminates" the transmission service, rendering the entire offering an unregulated information service. Although cable operators characterize this bundled offering as an information service alone, it is in reality two distinct services. As a facilities-based provider of information services that delivers those information services over its own transmission facilities, the cable operator cannot claim the exemption from common carrier status provided by the application of the contamination theory. That theory, which applies only to

non-facilities-based information service providers, is predicated on the fact that information service providers typically do not own the transmission facilities need to reach the public, and therefore purchase access to those facilities from a carrier that indiscriminately reaches the public with its facilities – i.e., a common carrier. Where the information service provider and the facilities-based transmission provider are the same, the contamination theory does not apply, as is made clear by *Computer II* and other clear Commission precedents, which were codified into statutory law by the Telecommunications Act of 1999 (the "1996 Act"). Cable industry commenters do not even mention, much less attempt to distinguish, these controlling and properly decided precedents.

Also in support of its position that cable operators are not providing cable modem services on a common carrier basis (and that they are therefore exempt from the *Computer II* requirements), the cable industry argues that, if and when it decides to sell transmission to unaffiliated ISPs, it will do so on individualized terms and conditions, thus rendering that offering "private carriage." The cable industry's discussions about its potential future relationships with ISPs entirely miss the mark. The fact is that cable companies today are indiscriminately offering Internet access and the underlying transmission (i.e., "cable modem service") directly to millions of subscribers for a fee.

That cable operators are providing the transmission service is demonstrated by the comments of Excite @Home, as well as those of numerous cable operators and the industry's association. That cable companies are offering cable modem services directly to the public on indiscriminate terms and conditions, at "off-the-shelf" prices, is also demonstrated by the promotional

materials that the cable operators have posted on their web sites. In light of these undeniable, on-going, and indiscriminate offerings of telecommunications to the public for a fee over the cable networks, it is plain that cable operators are common carriers. As such, they must under *Computer II* and its progeny offer their transmission services to other ISPs on the same terms and conditions under which they provide those service to their own information service operations.

4. Requiring Cable Operators To Comply With Their Statutory Obligations Does Not Violate The First Amendment.

As a final effort to avoid their current statutory obligations as common carriers, the cable operators argue that to make them comply with the law would violate their First Amendment free speech rights. In this regard, they argue that being required to honor their common carrier obligations by ceasing their practice of refusing to sell transmission to other ISPs would constitute "forced speech." The argument is frivolous. The free speech rights that cable operators undeniably have with respect to "cable services" are based on their editorial control over the video programming and other programming services that they offer to their customers. When cable companies operate as telecommunications carriers, however, those protections simply do not apply. This is the case because the subscribers, not the cable operators, determine the content of the information transmitted over telecommunications services. Accordingly, the editorial control that is the root of the First Amendment protection for statutorily defined "cable services" simply does not exist with respect to cable modem services. By disclaiming any responsibility for material obtained from the public Internet over the cable operators' Internet access

services, the subscriber use agreements that many cable operators have posted on their web sites make it absolutely clear that cable operators have no editorial control over the information accessed through their cable modem services.

5. Conclusion.

By refusing to sell transmission services to competing ISPs, cable operators are in clear violation of their common carrier obligations as set forth by the Communications Act and the Commission's unambiguous rules. Notwithstanding the fact that the Commission has readily recognized that local exchange carriers offering functionally identical services (e.g. DSL) over their networks must sell those services to ISPs and others on a nondiscriminatory basis, the Commission has so far allowed the cable industry simply to ignore the statutory requirements that so plainly apply. This regulatory double standard appears to be based on nothing more than the fact that regulated services are offered over fiber/copper wire networks, while the so-far unregulated services are offered over fiber/coaxial cable networks. The Communications Act expressly states that such distinctions based on the nature of the facilities used to provide telecommunications services are not allowed. In addition, the fact is that cable operators are already providing telecommunications service to customers over fiber/coaxial cable networks as state certificated CLECs. It is only with respect to Internet access using "cable modem service" that it appears that the rules do not apply.

The current Commission policy of allowing cable operators to ignore their statutory obligations is harmful to ISPs, harmful to competition in the information services market, and harmful to consumers. Moreover, the policy

cannot be squared with the clear statutory mandate from Congress that like services must receive like regulation, regardless of the facilities used to provide those services. Nor can it be squared with Title II of the Act itself. Accordingly, EarthLink respectfully urges the Commission to announce at its earliest possible opportunity its acknowledgement that cable modem services are "telecommunications services" and to announce its intent to ensure that the Communications Act is enforced as written with respect to all covered carriers.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	))))	GN Docket No. 00-185

REPLY COMMENTS OF EARTHLINK, INC.

EarthLink Inc. ("EarthLink"), by its undersigned attorneys, files these reply comments in the above-captioned proceeding.

1. The Communications Act Does Not Allow Cable Operators To Provide Transmission For Internet Access Under Two Separate Regulatory Regimes.

a. Cable Operators Are Presently Offering Cable-Based High-Speed Transmission As Local Exchange Carriers.

As the National Cable Television Association (NCTA) successfully argued to the Fifth Circuit Court of Appeals, just as "a cable operator does not lose its identity as a cable operator simply by offering additional types of services, it is equally true that a LEC does not lose its identity as a statutorily-defined local exchange carrier simply by being engaged in other lines of business."[1] The court agreed, saying "[w]hen Congress wanted to distinguish traditional, "incumbent" LEC's from the new "competitive" LEC's (including cable

[1] "Reply Brief of Petitioner National Cable Television Association," U.S. Court of Appeals 5th Circuit, Docket No. 96-60844 (May 30, 1997) at 8, (hereinafter *NCTA City of Dallas Reply Brief*)

companies) whose entry the Act facilitated, it did so in plain terms."[2] In addition, the Fifth Circuit also disagreed with the Commission's claim that "the statute is ambiguous as to hybrid LEC/cable operators."[3] The court found that the Communications Act of 1934 (the "Act")[4] was not "silent" on how to treat these hybrid local exchange carriers (LECs), because "such companies did exist, and Congress did know about them."[5]

NCTA and other cable industry commenters claim that treating cable modem service as a telecommunications service "would force cable operators providing cable modem service to enter into a new area of business and become telecommunications service providers, a business in which they were not previously engaged."[6] This claim has no basis in fact. The fact is that many, if not all, of the major cable system operators presently operate affiliates that are registered in numerous states as local exchange carriers using the same cable facilities that are at issue in this proceeding.[7] Many of them have been

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[2] *City of Dallas, Texas v. Federal Communications Commission*, 165 F.3d 341 (5th Cir. 1999) (hereinafter *City of Dallas*) at 354 (emphasis added).

[3] *City of Dallas* at 353.

[4] The Communications Act of 1934 is codified generally at 47 U.S.C. 151 *et seq.*

[5] *Id.*

[6] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket 00-185, Comments of National Cable Television Association, (filed December 1, 2000)(hereinafter *NCTA Comments*) at 25. *See also, In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket 00-185, Comments of Cox Communications, Inc., (filed December 1, 2000) (hereinafter *Cox Comments*) at 17; and *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket 00-185, Comments of AT&T Corporation, (filed December 1, 2000)(hereinafter *AT&T Comments*) at 24.

[7] For example, according to applications submitted to the Georgia Public Service Commission, Cox affiliates are certificated in at least 9 states, and Time Warner affiliates are certificated in at least 10 states. According to an application submitted by TCI to the Public Utility Commission of Texas, they are certificated in at least 3 states.

registered local exchange carriers for some time. Gerald Levin, chairman and CEO of Time-Warner Incorporated, testified to the House Subcommittee on Telecommunications in 1995, that

> Cable operators with broad-band plant passing over 95 percent of American homes with strategically clustered facilities provide by far the best and perhaps only hope of competing head to head with the entrenched local telephone companies.
>
> My company has already initiated that competition in Rochester, New York, and we have applications pending in several states to offer telephone services. We are serious about all aspects of this business, and in fact, thanks to the use of dedicated fiber within our cable systems, we have been in the alternative long distance business since 1993.[8]

Indeed, Time Warner was granted a Certificate of Public Convenience and Necessity to offer facilities-based local exchange service in Rochester, New York and to provide all forms of resold telecommunications services throughout New York in December, 1993.[9] In addition, Time Warner was granted a Certificate of Public Convenience and Necessity to provide local exchange service in Ohio using its cable facilities in August of 1995.[10] The tariff filed by Time Warner with the public utilities commission in Ohio lists primary rate ISDN service as one of the many local exchange services offered to subscribers over its cable facilities.[11]

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[8] *Communications Law Reform: Hearings Before the Subcommittee On Telecommunications and Finance of the House Comm. on Commerce,* 104th Cong. 74 (May 10, 1995)(testimony of Mr. Gerald Levin, Chairman and CEO of Time Warner, Inc.)(hereinafter *1995 House Hearings*).

[9] *See* Exhibit 1 hereto.

[10] *See* Exhibit 2 hereto. See in particular pp. 5 (services to be offered); 16 (will use cable network); 17-18 (will sell to cable and non-cable subscribers); 19 (will permit interconnection); 27 (will design open network); 29-30 (granting LEC certification).

[11] *See* Exhibit 3 hereto. (Tariff Table of Contents and PRI ISDN description).

After the passage of the Telecommunications Act of 1996 (the "1996 Act")[12], cable operators have continued to apply for, and have been granted, certificates of authority to provide local exchange services in various states using their cable facilities. In its application for permission to provide local exchange services in Illinois, Tele-Communications Incorporated ("TCI"), through its subsidiary TCI Telephony Services of Illinois, argued that its entry into the local exchange market should be approved because:

> [C]ompetition will spur the introduction of new and innovative pricing plans that consumers demand, not only for their businesses, but also for their residences, as they establish home offices, seek access to the Internet, and engage in more efficient uses of the telecommunications network.[13]

If TCI believed it was able to provide Internet access as a cable service, then this statement would appear to be both inaccurate and extraneous. TCI was granted a Certificate of Service Authority to provide facilities-based exchange telecommunications services throughout the State of Illinois in June of 1998.[14]

TCI's tariff on file with the Illinois Commerce Commission includes service offerings over its cable facilities ranging from DS-0 (64 kbps) to DS-3

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[12] Pub. L. 104-104.

[13] *In the Matter of TCI Telephony Services of Illinois, Inc. Application for Certificates of Exchange and Interexchange (including Interexchange Carrier Access), Telecommunications Service Authority*, State of Illinois, Illinois Commerce Commission, Case No. 97-0619, Application of TCI Telephony Services of Illinois, Inc. (Nov. 24, 1997) at 10 (emphasis added). See also pp. 4 (regarding ownership); 6 (will use cable). Attached hereto as Exhibit 4.

[14] See Exhibit 5 hereto.

(44.736 Mbps) for residential, home business, and business use.[15] The services identified in this tariff include telephone exchange service and exchange access as defined in the Act,[16] and as a result TCI is operating as a LEC[17] in Illinois. The same is true for Time Warner in New York and Ohio, as well as all of the other cable operators that have tariffs on file with state commissions. As a LEC, each of these entities is subject to sections 201 and 251 of the Act[18], and is bound by the Commission's *Computer II* requirements[19] and other applicable rules and orders under section 251(g) of the Act.[20]

b. Congress And The Commission Agree That Equivalent Services Must Be Regulated Under The Same Statutory Regime.

Despite the fact that cable operators have sought and obtained State authorization to provide common carrier transmission services used for both business and residential high speed Internet access, when those same cable operators use "cable modem services" to provide Internet access and other information services over the same cable facilities used by the cable affiliate to

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[15] *See* Exhibit 6 (Tariff Table of Contents and Definitions). *See* Sheet No. 4 (showing Business, Home Business, and Residential Service at 1.18) and Sheet No. 23 (showing Type I Channel Speeds).

[16] *See* 47 U.S.C. § 153(47) (telephone exchange service) and 47 U.S.C. § 153(16) (exchange access).

[17] A LEC – local exchange carrier – is defined under the Act as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26).

[18] 47 U.S.C. §§ 201 and 251.

[19] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 77 FCC 2d 384 (1980) (hereinafter *"Computer II"). See infra,* Section 5a, for a discussion of the *Computer II* requirements.

[20] 47 U.S.C. § 251(g) (requiring all local exchange carriers to comply with exchange access and interconnection requirements).

provide local exchange services, they argue that those cable modem services are somehow exempt from the section 201, 251, and *Computer II* requirements that would be applicable to the same service when offered by a LEC over those facilities.

As far back as 1976, the D.C. Circuit Court of Appeals found that "the primary competition from the two-way utilization of cable will come from existing telephone facilities" and that the unregulated provision of two-way services by cable operators would be "objectionable as unfair to the regulated entities and as creating the possibility for abuse by an unregulated cable system."[21] Congress expressed this same concern when it enacted the Cable Communications Policy Act of 1984 (the "Cable Act"),[22] stating that:

> [T]he growing convergence of the cable and telephone industries raises issues of competitive equity and universal telephone service. Local telephone companies are obliged to serve all customers indifferently, at prices approved by regulatory authorities. If at the same time cable companies were permitted to offer communications services comparable to those offered by telephone companies, but only to a few subscribers at unregulated prices, competition between cable companies and telephone companies might not be fair.[23]
>
> ***
>
> H.R. 4103 [the legislation that ultimately became the Cable Act] maintains existing regulatory authority over all other [i.e., non-cable] communications services offered by a cable system, including the lucrative private line voice and data transmission services that could compete with communications services offered by telephone companies.[24]

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[21] *National Association of Regulated Utilities Commissioners v. Federal Communications Commission*, 533 F.2d 601 (1976) (hereinafter *NARUC II*) at 616.

[22] Pub. L. 98-549, codified generally at 47 U.S.C. § 521 *et seq.*

[23] H.R. Rep No. 98-934, at 28 (1984) (hereinafter *House Committee Report).*

[24] *Id.* at 29 (brackets added).

In the 1996 Act, Congress heeded the pleas of the cable industry to enact legislation to preempt state and local barriers to the provision of telecommunications services by cable operators,[25] to ensure that cable operators had mandatory rights to interconnect with the incumbent local exchange carrier's network,[26] to preempt local franchising authorities from regulating the provision of non-cable services by cable operators,[27] and to give cable operators relief from rate regulation so that cable operators could raise the capital they needed to upgrade their networks to compete with the phone companies.[28] At the same time, Congress did not remove the "one-way transmission to subscribers" requirement in the definition of cable service, nor did it amend the definition of "other programming service." Congress also deleted the statutory restriction that prohibited telephone companies from providing video programming directly to subscribers,[29] and added a new Part V to Title VI, called "Part V –Video Programming Services Provided By Telephone Companies".[30]

As NCTA observed in its reply brief in *City of Dallas*, "it is simply not persuasive to assert that the Congress which enacted the OVS [Open Video System] provision did not contemplate that LECs would be providing cable

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[25] *See* 47 U.S.C. § 253 (preempting state and local barriers to competition).

[26] *See* 47 U.S.C. § 251(c) (providing interconnection rights to incumbent LEC facilities).

[27] *See* 47 U.S.C. § 541(b)(3) (preempting local franchise authority over telecommunications services provided by cable operators).

[28] *See* Pub. L. 104-104, § 301(b) (Rate Deregulation). *See also Earthlink Comments* at 39-44 for a full discussion of the cable industry requests in testimony to Congress and the provisions Congress enacted in response to those requests.

[29] Pub. L. 104-104, § 302(b) (Repeal).

[30] Pub. L. 104-104, § 302(a) (Provisions for Regulation of Cable Service Provided By Telephone Companies).

service or that cable companies would be providing local exchange service through what FCC counsel now calls 'hybrid' companies."[31] As NCTA correctly asserted, Congress in enacting the 1996 Act continued the long-standing statutory, regulatory, and judicial practices of applying a regulatory regime on the basis of the service provided, rather than on the basis of the facility used to provide that service.[32]

The Commission, in its *Open Video Systems Second Report and Order*, clearly stated that it does "not believe that Congress intended to create a competitive video marketplace by giving one competitor a regulatory option that would be unavailable to all others."[33] Yet that is precisely what the cable industry argues should be the case when it comes to Internet access and other information services transmitted using a cable modem service.

All of the issues raised in the *NOI* boil down to this simple question: should the same functional service – in this case the transmission of Internet access and other information services – be able to be provided to end-users over the same facility under two different regulatory regimes, the choice of which depends solely on what the facilities-based provider of that transmission chooses to call the service? Nothing in the Act, the Commission's own rules

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[31] *NCTA City of Dallas Reply Brief* at 7 [brackets added].

[32] See 47 U.S.C. § 153(46) ("the term 'telecommunications service' means the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.") (emphasis added). *See also Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, 13 FCC Rcd. 11501, 11548 ¶ 98 ("We are mindful that, in order to promote equity and efficiency, we should avoid creating regulatory distinctions based purely on technology. Congress did not limit "telecommunications" to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users.") and footnote 204.

[33] *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, CS Docket 96-46, Second Report and Order (rel. June 3, 1996)(hereinafter *Open Video Systems Second Report and Order*) at ¶ 15.

and precedents, the courts' interpretation of the Act and those rules and precedents, or the comments submitted in this proceeding supports such a result. Accordingly, EarthLink urges the Commission to end this special privilege for cable operators immediately by acknowledging that cable modem service is a telecommunications service under the Act.

2. The Proper Classification Of "Cable Modem Services" Depends Upon A Clear Definition of That Term.

A number of comments submitted in defense of the proposition that Internet access and other information services offered to consumers using cable modem service are "cable services" as defined under section 602(6) of the Act[34] fail to define their understanding of the term "cable modem service." The result is that parties use the term to mean everything from simple transmission, to Internet access, to the full range of services offered over the Internet. In order for any meaningful action on the part of the Commission to emerge from this proceeding, it is necessary first to agree on the description of the service under consideration.

As EarthLink made clear in its initial comments, EarthLink uses the term "cable modem service" to mean the underlying facilities-based transmission service that is necessary to provide the information service commonly referred to as "Internet access." To the extent that commenters use the term "cable modem service" to refer to the bundled package of cable transmission service and Internet access service and/or other information services provided to end users, those comments unnecessarily cloud the issue

[34] 47 U.S.C. § 522(6).

before the Commission. EarthLink agrees with the Commission and most other commenters (including some cable industry commenters) that Internet access and other information services offered over cable facilities, or indeed any facilities, are Title I "information services." The regulatory classification of these information services, which ride over the cable modem transport service, is not at issue in this proceeding.

Instead, the issue addressed by the *NOI* is whether the cable modem transmission services over which Internet access and other information services are provided to end users reached by a cable facility are "telecommunications services" subject to Title II of the Act.[35] As discussed in detail in EarthLink's December 1 comments, and as discussed further below, there can be no doubt under the Act and the Commission's controlling precedent that these facilities-based cable transmission services are Title II telecommunications services. As such, the facilities-based companies that use those transmission services to provide information services ubiquitously to end-users are required to offer the transmission services unbundled from any accompanying information service to other providers of information services on reasonable and non-discriminatory terms that are publicly available.[36]

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[35] 47 U.S.C. §§ 201 et seq.

[36] Because a cable facility owner providing telecommunications service is not an incumbent local exchange carrier under section 251(h) of the Act (47 U.S.C. § 251(h)), it is subject to the same requirements that apply to all other competitive carriers, including, requirements applicable to competitive local exchange carriers.

3. The Commission Has A Clear Record On Which To State Its Position Immediately.

Because the statutory classification of cable modem service determines, without further Commission action, which existing regulatory regime applies to cable modem services, EarthLink devotes these reply comments to responding to the arguments offered by those that do not agree that cable modem service is a telecommunications service.

In focusing on the proper statutory classification of cable modem services, EarthLink respectfully reiterates its strong request that the Commission state its position on the statutory classification of cable modem services immediately. As the Commission itself has acknowledged, if the Commission does not speak clearly and soon, other authorities will be forced to decide the question.[37] The Commission's continued refusal to declare its view on how the provisions of the Act apply to cable modem service is harmful to Earthlink and other Internet service providers (ISPs) in their efforts to provide broadband Internet access to consumers.

ISPs, cable companies, non-cable broadband providers, and consumers all need to know where the Commission stands on this critical issue.

The passage of time and developments in the broadband markets have turned the Commission's "hands off" policy[38] into regulatory favoritism toward one particular class of facilities-based providers of Internet access and other information services. As the Commission argued, and as the 5th Circuit Court of Appeals upheld, "[a] cable operator's market power arises from, among other

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[37] *In the Matter of Inquiry Concerning High Speed Access to Cable and Other Facilities*, GN Docket 00-185, Notice of Inquiry (rel. Sep. 28, 2000) (hereinafter *NOI) at* ¶ 6-7.

[38] *NOI* at ¶4.

things, the ownership of its transmission network. . . . factors [that] would survive the termination of a cable operator's cable franchise and would put any would-be competitor at a substantial disadvantage."[39] Why the Commission persists in enhancing that market power by refusing to apply the same Title II requirements to cable operators providing telecommunications services that apply to other competitive providers of such services is a continued mystery and frustration to Earthlink.

Based on the extensive and detailed comments filed to date, the Commission will in this proceeding have before it a more than adequate record on which to decide what is in the end a relatively simple question of statutory construction. In short, the facts are clear, the need for a Commission determination is acute, and the record is as complete as it will ever be. Accordingly, EarthLink urges the Commission at a minimum to announce at the earliest possible opportunity its decision as to the proper statutory classification of cable modem service.[40]

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[39] *City of Dallas,* 165 F.3d 341 at 356. The court noted that any entity seeking to construct or acquire a competing cable network would be undertaking a "costly and time-consuming venture" and that that the 'former cable operator probably would maintain a monopoly position... for some time." *Id.* at fn. 20. Earthlink agrees that cable operators enjoy advantages that other CLECs do not, in particular ownership and control of a ubiquitous local transmission network. For that reason alone, they are more like incumbent LECs than CLECs, and thus forbearance under section 10 of the Act (47 U.S.C. § 160) is clearly not warranted.

[40] In its December 1, 2000 comments in this proceeding, EarthLink on page 54 proposed a two-step process for address the cable modem access issue. In the first step suggested by EarthLink, the Commission would state its decision as to the proper regulatory classification of "cable modem services." In the second step, the Commission could conduct a rulemaking to provide basic guidance regarding publication of pricing and technical information, nondiscrimination, etc. Because of the urgency of the matter, EarthLink reiterates its request that the Commission at least address the regulatory classification issue at its earliest possible opportunity. *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket 00-185, Comments of EarthLink, Inc. (Dec. 1, 2000)(hereinafter *EarthLink Comments*).