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EX PARTE OR LATE FILED

January 31, 2001

**By Hand**

Ms. Magalie Roman Salas  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation Regarding the Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; GN Docket No. 00-185

Dear Ms. Salas:

On behalf of EarthLink, Inc. (EarthLink) we hereby submit an original and one copy of this notice regarding a permitted *ex parte* presentation in the above-referenced proceeding. On January 30, 2001, Dave Baker, EarthLink Vice President for Law and Public Policy, and Earl Comstock and John Butler of Sher & Blackwell met with the following Commission staff: Ava Holly Berland, John Norton, Johanna Mikes, Christopher Libertelli, Shari Keiser, Michelle Carey, William Johnson, and Robert Pepper.

Mr. Baker opened the meeting by describing EarthLink's experience in the Internet access market. EarthLink is the nation's second largest Internet service provider (ISP), with over 4.7 million customers, including 215,000 broadband subscribers. In the fourth quarter of 2000, EarthLink's dial-up access subscriber base remained flat, while the number of broadband subscribers increased by 50 percent. This illustrates the dramatic increase in demand for broadband access over dial-up access and the need for ISPs to be able to offer broadband services to existing and prospective customers. This in turn demonstrates the need for the Commission to act quickly to require cable companies to fulfill their legal obligation to resell their cable-based transmission services if there is to be a competitive market for broadband Internet access.

Mr. Baker emphasized that there is no such competitive market today, because

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cable companies generally refuse to provide broadband transmission service to unaffiliated ISPs.

Following the introduction, EarthLink's presentation and questions from staff focused on the issue of whether cable operators providing Internet access through the use of their own transmission facilities are telecommunications common carriers subject to Title II of the Communications Act. That issue is central to the proper classification and regulatory treatment of "cable modem services" because, if cable modem services constitute a common carrier telecommunications service, they are subject to Title II obligations, including the *Computer II* obligations of unbundling and resale of transmission on nondiscriminatory terms to other information service providers (e.g., ISPs). With respect to this question, EarthLink presented and discussed a set of questions designed to assist in determining whether a particular entity is a telecommunications common carrier under applicable court and Commission precedents. A copy of that set of questions is attached.

In the course of the discussion of the proper application of the legal test for common carrier status, staff raised and EarthLink answered a number of questions regarding arguments made by cable industry commenters in the initial and reply comments. The questions raised and the points made by EarthLink are as follows:

1. Cable industry commenters have argued that they are not providing "telecommunications" to the public for a fee because they do not offer "pure transmission" over their cable networks. Although cable industry commenters have not used the term "contamination theory," the assertion that cable companies do not offer a "pure" transmission service is an argument that the contamination theory should apply to Internet access services that cable companies provide using their own transmission networks. This argument is without merit for at least three reasons.
  - a. The contamination theory is an exception to the otherwise applicable rule that information service providers are common carriers. The Commission has made it clear, however, in the *Computer* proceedings, the *Frame Relay Order* and elsewhere, that the contamination theory does not apply to information services that are offered by a facilities-based carrier that uses its own transmission facilities to provide such information services. Commission precedents on this point are addressed in EarthLink's Comments at pages 28-31 and EarthLink's Reply Comments at pages 29-33.
  - b. That a cable Internet subscriber is charged only a single price does not change the fact that the information service and the transmission service over which it is delivered are viewed as distinct services for regulatory purposes when the service provider uses its own transmission facilities. This point is discussed in EarthLink's Comments at pages 26-27 and EarthLink's Reply Comments at page 32.

- c. Third, as demonstrated in the Reply Comments of EarthLink, the major cable companies have sought and obtained LEC certification in multiple states. The services offered pursuant to those grants of authority are provided in whole or in part over the same fiber/coaxial cable networks used to provide cable modem service; moreover, these cable companies in their LEC persona offer ISDN and T-1 services that can be and are used for Internet access. Accordingly, these companies in fact do provide "pure transmission" for the purpose of providing Internet access.
2. Cable industry commenters have argued that to the extent that they provide telecommunications, they do so on a "private carriage" basis rather than a "common carriage" basis, and thus are not subject to Title II requirements such as the *Computer II* unbundling and resale requirements. The basis offered by the cable industry for this assertion is that cable operators will in the future provide transmission services to ISPs on the basis of individualized negotiations, and that such offerings will therefore not be made "indiscriminately" to the public. This argument completely ignores the fact that cable operators are today offering their Internet access services (and thus the underlying telecommunications services) directly to millions of subscribers on an indiscriminate basis. As discussed at length in the EarthLink Reply Comments (pages 36-45), this is conclusively demonstrated by the comments of cable operators themselves, the comments of Excite @Home, and the information contained on the web sites of cable operators and Excite @Home.

In this regard, EarthLink provided to staff a copy of material printed from Excite@Home's web page (copy attached). That material directs potential customers interested in receiving the Excite@Home services to contact their local cable company. EarthLink also referred to exhibits filed with EarthLink's Reply Comments consisting of cable company web site printouts that demonstrate that the cable companies are offering their services directly to subscribers at standard prices. (In this regard EarthLink attaches hereto for convenience copies of Exhibits 9-12 of its Reply Comments, previously filed in this docket.)

In the context of the private carriage/common carriage issue, EarthLink pointed out that no cable industry comments discussed or even acknowledged the fact that cable companies are currently offering and providing directly to subscribers mass market Internet access services over the cable companies' own facilities at standard rates and conditions. These facts, which the cable companies have ignored in their comments, conclusively demonstrate that cable companies that provide Internet access using their own transmission facilities are providing common carrier telecommunications services indiscriminately to the public for a fee. Accordingly, those telecommunications services are subject to Title II of the Communications Act, and the companies offering them are

required to make the underlying transmission services available unaffiliated ISPs on nondiscriminatory terms and conditions.

3. Finally, the EarthLink representatives addressed staff questions regarding the possible applicability of *Virgin Islands Telephone Corp. v. F.C.C.*, 198 F.3d 921 (D.C. Cir. 1999). In this regard, EarthLink pointed out that:
  - a. The only issue that the court addressed in *Virgin Islands* was whether the Commission acted reasonably in holding that the term “telecommunications carrier” as added by the 1996 Act is synonymous with the term “common carrier” as interpreted by the *NARUC I* court;
  - b. The *Virgin Islands* court in footnote 6 of its opinion expressly stated that it did not reach the question of whether the Commission properly applied the *NARUC I* test;
  - c. The majority of the purchasers of the submarine cable capacity at issue in *Virgin Islands* were themselves common carriers; and
  - d. *Virgin Islands* dealt with a future service as opposed to a current service, and thus addressed a situation entirely different from the situation presented by on-going cable company offerings of telecommunications services directly to end users on standard terms and conditions.

Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,



Earl W. Comstock  
John W. Butler

Counsel for EarthLink, Inc.

cc: attached list

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Michelle Carey

William Johnson

Carl Kandutsch

Shari Keiser

Christopher Libertelli

Johanna Mikes

John Norton

Robert Pepper

Douglas Sicker

International Transcription Services, Inc. (ITS)

**Questionare to Determine if an Entity is a Communications Common Carrier**

1. **Does the entity offer indiscriminate service to whatever public its service may legally and practically be of use to?**

*NARUC I*, 525 F.2d 630 at 642.

No \_\_\_\_\_ Entity is not a common carrier.

Yes \_\_\_\_\_ Go to Question 2.

2. **Does the service allow users to transmit intelligence of their own design and choosing?**

*NARUC I*, 525 F.2d 630 at 641, n. 58. See also *NARUC II*, 533 F.2d 601 at 609.

No \_\_\_\_\_ Entity is not a communications common carrier.

Yes \_\_\_\_\_ Go to Question 3.

3. **Does the entity own or control the transmission facilities used to provide the service to the public?**

*Frame Relay*, 10 FCC Rcd 13717 at 13722, ¶¶ 41 and 42. See also *Computer II*, 77 FCC 2d 384 at 474, ¶ 231.

No \_\_\_\_\_ Go to Question 4.

Yes \_\_\_\_\_ Entity is a communications common carrier.

4. **Is the service offered indiscriminately to the public over facilities not owned or controlled by the entity an enhanced or information service?**

*Frame Relay*, 10 FCC Rcd 13717 at 13719, ¶ 17. See also, *Id.* at 13718, n. 6 (definition of VAN).

No \_\_\_\_\_ Entity is a communications common carrier (i.e., a reseller).

Yes \_\_\_\_\_ Entity is not a communications common carrier.

obligations under this Agreement, including, without limitation, to any parent, subsidiary or other affiliated company of Comcast.

- e. *General.* In the event that any portion of this Agreement is held to be unenforceable, the unenforceable portion shall be construed in accordance with applicable law as nearly as possible to reflect the original intentions of the parties and the remainder of the provisions shall remain in full force and effect. Comcast's failure to insist upon or enforce strict performance of any provision of this Agreement shall not be construed as a waiver of any provision or right. Neither the course of conduct between the parties nor trade practice shall act to modify any provisions of this Agreement. This Agreement may not be assigned or transferred by Customer. This Agreement shall be exclusively governed by, and construed in accordance with, the laws of Customer's state of residence where the Service is provided.

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Please read the following terms and conditions before using the software (the "Software") provided by At Home Corporation ("@Home Network") for use with the @Home Network service (the "Service"). If you do not agree with these terms, you must terminate your enrollment and forego use of the Service.

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@Home Network grants to you a non-exclusive license to use the Software and accompanying documentation ("Documentation") as described below.

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The software is not fault-tolerant and is not designed, manufactured or intended for use or resale as on-line control equipment in hazardous environments requiring fail-safe performance, such as in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, direct life support machines, or weapons systems, in which the failure of the Software could lead directly to death, personal injury, or severe physical or environmental damage ("High Risk Activities"). @Home Network and its licensors specially disclaim any express or implied warranty of fitness for High Risk Activities.

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9. *Miscellaneous.*

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What is the @Home service?  
Is @Home a proven technology?

**Speed and "Always On"**

How fast is it?  
What does a faster connection do for me?  
What does it mean that @Home is "always on"?

**Price**

How much does the @Home service cost?  
Are there additional installation or setup fees?

**Availability**

Can I get @Home in my neighborhood?  
How do I connect to the @Home service?  
Do I still need my Internet Service Provider?  
Does @Home install new cable in my neighborhood?  
If I don't subscribe to cable TV, can I still get the @Home service?  
What's involved in the installation process?

**Hardware and Software**

What hardware and software do I need to use @Home?  
What software does the @Home service include?  
What hardware does the @Home service include?  
What is a cable modem?

**Features**

Can I have more than one email address?  
If I subscribe to @Home, can I use it on more than one computer?  
What Web browsers does @Home support?  
Does the @Home service include chat and newsgroup options?  
Can I have my own Web site on the @Home service?  
What search engines does @Home support?

Can I use my @Home service when I travel?

Can I attach a server to your network?

Can I use any TCP/IP stack with the @Home service?

Can I use @Home while watching TV?

## Safety

How does @Home help make the Internet safe for kids?

What steps does @Home take to help ensure that my online experience is safe and secure?

## What is the @Home service?

@Home is one of the fastest home Internet services you can get. It delivers the full power of the Internet—incredible multimedia, streaming music, and unlimited possibilities for fun, learning, and communication—to your computer using a cable wire instead of a phone line.

The @Home service provides all the features you need to enjoy the Web, including a customized browser, search and navigation tools, up to seven email accounts, up to 70MB of personal WebSpace, incredible broadband content from Excite, 24 x 7 technical support, and chat and newsgroup access.

[TOP](#)

## Is @Home a proven technology?

Over 2 million people use @Home, making it the #1 high-speed Internet service in the world. You may be the first on your block to have @Home, but you won't be the last.

[TOP](#)

## How fast is it?

Incredibly fast! @Home is up to 100 times faster\* than a 28.8K modem!

A 3.5MB file could take more than 16 minutes to download using a typical dial-up connection, compared to about 10 seconds on @Home. It's really that fast!

[TOP](#)

## What does a faster connection do for me?

@Home's advanced network was created with high-speed access in mind, so the exclusive Excite programming you get is richer and more interactive. Play online games, download movie trailers, and watch videos of late-breaking news without the annoying wait of a dial-up service! Create your own personalized broadband start

page, with fast access to the information that matters to you the most. With the high-speed @Home service, the Internet is more alive than ever before.

[TOP](#)

**What does it mean that @Home is "always on"?**

It means that you never have to dial up again. If your computer is on, you're online—with instant, high-speed access to everything the Internet has to offer.

[TOP](#)

**How much does the @Home service cost?**

Less than you might think. Monthly subscription prices range from \$35 to \$55 per month. Most subscription prices include cable modem. *Varies by cable provider* .

[TOP](#)

**Are there additional installation or setup fees?**

The installation fee ranges from \$99 to \$175, depending on your cable provider and the city you live in. However, with the new self-installation kit\* available from RadioShack, consumers within the Excite@Home broadband footprint will be able to visit participating RadioShack stores and purchase a QuickStart installation kit and cable modem. Once at home, customers will activate their modem and account by phone and run the Startup CD, which will walk them through a consumer-friendly installation. Once connected and activated, consumers will immediately experience the high-speed and rich content of broadband Internet service.

\* Limited market availability.

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**Can I get @Home in my neighborhood?**

The @Home service is offered by your local cable company and available in selected areas throughout the United States and Canada. [Click here](#) to find out if @Home is available in your area.

Providers include: Adelphia, AT&T Broadband, Charter Communications, Cogeco Cable, Comcast, Cox Communications, Daniels Cablevision, Eastern Connecticut Cable, Horry Telephone, Insight Communications, Midcontinent Cable, Moffatt Cable, Rogers CableSystems, Shaw Communications, Susquehanna Communications, USA Media, and

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**How do I connect to the @Home service?**  
A cable modem connects your PC to @Home's high-speed cable network. After the initial installation, there's no need to "connect" again. You're always on.

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**Do I still need my Internet Service Provider?**  
No. @Home gives you a lightning-fast connection to the Internet, plus email, WebSpace, and a personal start page. @Home gives you everything you need. And more.

[TOP](#)

**Does @Home install new cable in my neighborhood?**  
No. Instead of installing new cable in your neighborhood, your local cable provider modifies and upgrades the existing cable TV network to handle two-way data communication. The process involves adding signal amplifiers to create a dedicated "upstream" data channel from your home to the cable TV plant.

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**If I don't subscribe to cable TV, can I still get the @Home service?**  
Depending on your cable provider, you might be able to get the @Home service even if you don't subscribe to cable TV.

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**What's involved in the installation process?**  
One of the advantages of using @Home is that in most cases it uses the existing cable in your home. This cable can carry video and data signals simultaneously.

While it may only be necessary to install a splitter on the existing cable, due to the potential for *introducing "noise" or interference into your cable system*, a qualified technician will perform the installation of the splitter and cable outlet. If user-installed splitters are already present, the technician will perform quality assurance tests before deeming the service operational, and, if necessary, will rewire the outlet to meet proper specifications.

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**What hardware and software do I need to use @Home?**

@Home supports Windows 95, Windows 98, Windows NT 4.0, Windows 2000 Professional, Windows ME, and MacOS 8.5 or later. The table below outlines system requirements:

	Windows 95	Windows 98	Windows NT 4.0	Mac OS 8.5
Operating System	Windows 95	Windows 98 Professional / ME/NT 4.0	Windows NT 4.0	Mac OS 8.5
Processor	33MHz	200MHz or greater	PowerPC 601/100MHz	PowerPC 601 or higher/200MHz or higher
RAM	16MB	14MB or greater	32MB	32MB
Hard Drive	10MB	100MB	100MB	50MB

Please Note: Your computer MUST have a CD-ROM drive.

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**What software does the @Home service include?**

The @Home service includes a custom browser along with some of the most popular plug-ins—QuickTime, RealPlayer, Flash, and Shockwave. In addition, you get @Home Assistant for quick access to content and special features, as well as a Network Diagnostic tool for troubleshooting.

[TOP](#)

**What hardware does the @Home service include?**

@Home will help you get all the hardware you need to get your service up and running. In many areas, this includes a cable modem and equipment to connect it to your computer. In other areas, you may be able to purchase your own cable modem. Either way, your cable company will make sure you have everything you need to have a great @Home experience.

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**What is a cable modem?**

A cable modem is an external device that connects to your computer. Cable modems translate radio frequency (RF) signals to and from the cable plant into Internet Protocol (IP); the communications protocol spoken by all

computers connected to the Internet. To learn more about cable modems, visit the [@Home Cable Modem Gallery](#).

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**Can I have more than one email address?**  
Yes. Up to seven email addresses are included in @Home's low monthly fee.

[TOP](#)

**If I subscribe to @Home, can I use it on more than one computer?**  
Yes. You can connect up to five computers to @Home and have them all online simultaneously. We provide up to five IP addresses so that you can create your own home network. *Additional fee applies. Availability varies by cable provider. Customer is responsible for networking computers.*

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**What Web browsers does @Home support?**  
@Home supports the @Home custom browser. Based on Microsoft Internet Explorer, our custom browser is designed to be extremely user-friendly. The @Home software package also includes popular multimedia plug-ins and applications like QuickTime, RealPlayer, Flash, and Shockwave to help enhance your @Home experience.

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**Does the @Home service include chat and newsgroup options?**  
Yes. @Home offers one-click access to your favorite chat rooms and newsgroups on the Web.

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**Can I have my own Web site on the @Home service?**  
Yes. @Home gives you 10MB of WebSpace per email account; up to 70MB per subscription. Build a family tree. Showcase vacation photos. @Home lets you create your place in cyberspace.

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**What search engines does @Home support?**  
@Home uses Excite Precision Search. Based on groundbreaking relevance technologies, it analyzes up to 250 million Web pages in the Excite search index to select the most relevant matches. Results provide links to many different resources, including news articles, photos,

[TOP](#)

**Can I use my @Home service when I travel?**  
Yes. @Home provides remote access service that allows you to check your email and connect to the Internet when you're away from home.

@Home's Dial-Up Access service lets you use a telephone modem to access @Home and the Internet. You can read and send email, get the latest news, visit your favorite Web sites, chat rooms, and newsgroups—everything you would do if you were at home. @Home provides coverage throughout North America. *Additional fee applies. Availability varies by cable provider.*

@Home also offers NetMail—a service that lets you check your @Home email from any computer with an Internet connection and an email client supporting the POP interface (such as Internet Explorer, Netscape, and Eudora).

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**Can I attach a server to your network?**  
No. The @Home service is for private, residential use only and does not support or allow servers of any kind. However, @Work® offers products that allow the kind of connectivity a server requires. For more information, please visit [@Work](#).

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**Can I use any TCP/IP stack with the @Home service?**  
Yes. However, @Home currently supports only Windows 95, 98, NT 4.0, 2000 Professional, and MacOS 8.5 and later, with Open Transport v. 1.1 or greater TCP/IP stacks.

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**Can I use @Home while watching TV?**  
Yes. Although the @Home service enters your home through the same cable as your television signal, it operates independently. So go ahead. Check email, chat online with friends, or visit a Web site while watching your favorite shows.

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**How does @Home help make the Internet safe for kids?**  
Most of today's parental control software can be used in conjunction with the @Home service to limit access to inappropriate online material.

@Home encourages parents to get involved with their children's online activities.

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What steps does @Home take to help ensure that my online experience is safe and secure? Please see our [Online Security](#) statement.

[TOP](#)

\* Actual speeds will vary. Many factors affect download speeds. Please see [The Facts About Speed](#) for more information.

[Company Info](#) | [Contact us](#) | [For current subscribers](#)

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# EXHIBIT 9



**Comcast**  
COMMERCIAL ONLINE

Home  
Our Products  
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# Products

## CCIS- Full Service

Our full service Comcast Commercial Internet Service offering gives your business or school everything you need in a turnkey package. It is designed with the 2-50+ computer network in mind and provides our highest levels of services and support available.

### Quick Hits...

Perform an [online availability check](#) of your location.

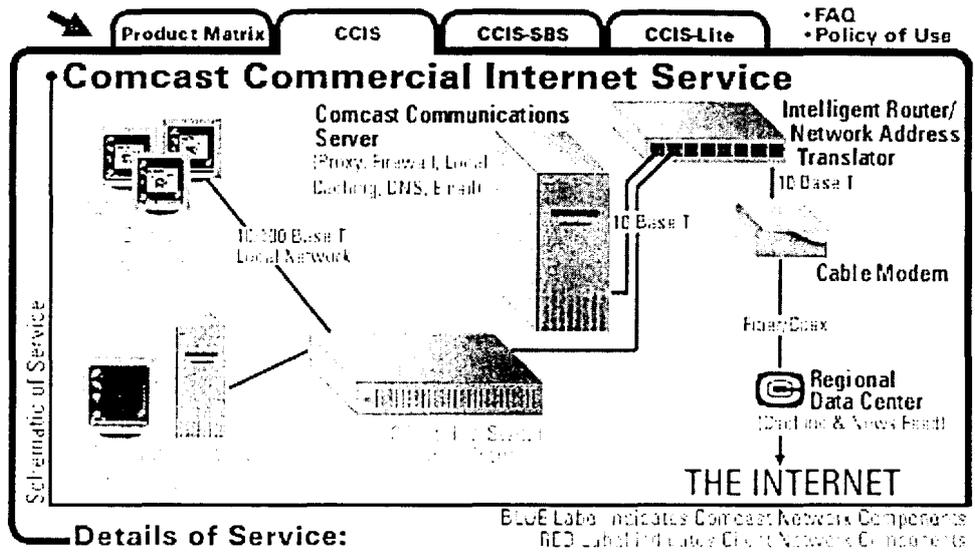
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Comcast begins testing wireless LAN technologies more info...

Certified as First IP-based Cable Service in the Cisco Powered Network Program



Details of Service:

Product Name	CCIS Comcast Commercial Internet Service
# Workstations	1 - 50+
Downstream Speed	256 Kbps/ 512 Kbps / 1.544 Mbps - Speed Varies By Contract
Monthly Price Range	Up to 25 Workstations: \$345/month (256 Kbs), \$535/month (512 Kbs), \$695/month (1,544 Kbs). Additional \$10/mo. for each workstation over 25.
Installation Fee	\$2995 for basic install. Cost may vary based on location.
Backbone Network	New 5Gbps, Tier 1 fiber-optic IP network for fast, reliable Internet access. [Details]
Client Software Provided	Customized Microsoft Internet Explorer
DNS / Domain Names	Included.
Email Accounts	Comcast provides DNS-based branded email; user@companyname.com. Unlimited accounts.
Email Access Via Web	Included. "Anytime, Anywhere" access to your email using a web based email application. [Comcast Letterbox™ Details]
Web Space	Included. www.companyname.com. 40 Mb of storage. Additional storage by contract. [Web Hosting Details]
Content Filtering	Optional. SurfWatch proxy-based filtering. [Details/Pricing]
CCIS OpenPort™	Optional. Customized port passthru. \$45/mo., \$95 install.

<b>Customer Service Level</b>	24 x 7 Priority Support
<b>News</b>	Central News Server in Regional Data Center
<b>Connection Type</b>	Cable Modem - Always On

[\[ Products FAQ \]](#)

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You may also use our convenient [Online Feedback Form](#)

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