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December 21, 2001

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By Hand

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

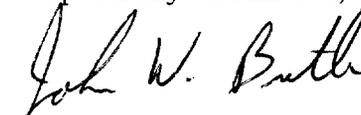
Re: Notice of *Ex Parte* Presentation By EarthLink, Inc. in GN Docket No. 00-185/- Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Ms. Salas:

On behalf of EarthLink, Inc. (EarthLink), we hereby submit for inclusion in the above-referenced docket an original and one copy of a permitted written *ex parte* communication that is being delivered today to Chairman Powell and Commissioners Abernathy, Copps and Martin. A copy of the attached comments are also being sent to Mr. W. Kenneth Ferree, Ms. Royce Sherlock, and Ms. Sarah Whitesell of the Cable Services Bureau.

Please direct any questions regarding this filing to the undersigned. Thank you for your assistance in this matter.

Respectfully submitted,



John W. Butler

Counsel for EarthLink, Inc.

cc: Qualex International

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
U.S. DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Docket No. 011109273-1273-01

Notice and Request for Comments on
Deployment of Broadband Networks and
Advanced Telecommunications

COMMENTS OF EARTHLINK, INC.

EarthLink, Inc. ("EarthLink"), by its counsel, respectfully submits these comments in response to the notice and request for comments published by NTIA in the *Federal Register* on November 19, 2001, 66 *Fed. Reg.* 57941 (the "Notice"). EarthLink applauds NTIA's initiative in seeking to bring clarity and understanding to the debate over high speed Internet access, also known as broadband services – a topic about which there has recently been a great deal of unnecessary and counterproductive confusion, and which these comments hope to clarify.

I. Identity And Interest of EarthLink, Inc.

EarthLink is the nation's third largest Internet service provider ("ISP"). EarthLink serves nearly five million customers, an increasing number of whom are transitioning from dial-up "narrowband" Internet access to broadband services. In providing high speed Internet access, Earthlink is "platform agnostic," meaning it offers such service across a wide variety of platforms

including cable, digital subscriber line (DSL), fixed wireless and satellite.¹ However, EarthLink, like most other ISPs which offer broadband Internet access, does so primarily over cable and DSL transmission facilities. Although satellite and fixed terrestrial wireless platforms can and do provide important service links in some markets, cable and DSL account for over 95% of the broadband connections across the country now, and will for the foreseeable future. As between cable and DSL, DSL supports the majority of EarthLink's broadband subscribers. The predominance of DSL in EarthLink's operations is not by choice. Rather, it is the result of the refusal by all but one of the major cable companies that use their own facilities to provide broadband Internet access to their customers to comply with their common carrier obligation to provide the underlying transmission service that they use for their own high-speed access service to independent ISPs.

As one of the nation's last major independent ISPs, EarthLink provides its Internet access services to subscribers over the local transmission networks of facilities-based providers (both cable and telephone). EarthLink is vitally interested in ensuring that the statutory obligations of those carriers to provide nondiscriminatory transport services to ISPs are acknowledged and enforced. Because the transmission link between the ISP and its customers is the fundamental building block needed for all narrowband and broadband Internet access services, it is this critical issue of nondiscriminatory ISP access to basic telecommunications services to which EarthLink directs the bulk of its comments.

¹ EarthLink also provides narrowband mobile wireless Internet connections to customers using devices such as the RIM BlackBerry 950 and 957 personal digital assistants and the Motorola T 900 2-way wireless communicator.

II. No Meaningful Discussion Of Broadband Policy Can Take Place Until The Federal Communications Commission Addresses the Application Of The Common Carrier Provisions Of The Communications Act To Cable Based High-Speed Internet Access.

Many of the questions in the Notice are directed to physical deployment of broadband facilities and competition among facilities-based providers of broadband services. These are clearly important questions, because without the ubiquitous availability of one or more transmission platforms there is no means of delivering the competitive information services that are transmitted to subscribers using such platforms. It should be noted that the Commission has already stated clearly that the common carrier obligations of title II of the Communications Act apply without question to T-1 and DSL based Internet access services.² In the context of these questions, the Notice asks commenters to address the proper definition of the term “broadband.” Certainly for the purpose of clear communication, there should be some common understanding of that term. Having said that, data transport services are routinely defined very precisely by their potential and actual transmission speeds. Accordingly, from a technical standpoint, there is no need to wrestle unduly with some all-encompassing definition of “broadband,” which after all is simply shorthand for a range of high-speed transmission capabilities. Moreover, we should keep in mind that “broadband” will likely be an evolving term. What is considered

² See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 98-188 (released Aug. 7, 1998) at ¶35. See also, *In the Matter of GTE Telephone Operating Companies GTOC Tariff No. 1*, FCC 98-292 (released Oct. 30, 1998) at ¶1.

“high-speed” or “broadband” today will inevitably be viewed as quaintly obsolete tomorrow.

Although any definition of “broadband” that turns on transmission speeds will necessarily have to be changed constantly to adjust to improvements in technology, there is another important and relevant definition that will not change absent an Act of Congress. That is the definition of the term “common carrier” found in the Communications Act, as amended (the “Act”). 47 U.S.C. § 153(10).

The proper application of the concept of common carriage to cable-based transmission systems used to provide Internet access has been pending unanswered at the Federal Communications Commission for at least three years.³ Further, since September 28, 2000, the Commission has had open a proceeding entitled “Inquiry Concerning High-Speed Access To the Internet Over Cable and Other Facilities” (GN Docket No. 00-185). Most recently, the Commission opened dockets that will examine regulatory policies for incumbent local exchange carriers that provide DSL service used to deliver Internet access. See December 12, 2001, FCC News Release announcing CC Docket Nos. 01-337 and 01-339. That news release also indicated that the FCC will soon open yet another proceeding to re-examine the proper regulatory regime for broadband Internet access services generally.

In connection with these Commission proceedings, it has been suggested by some that the issues surrounding high-speed access to the Internet may be

³ See, e.g., *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, Memorandum and Order, 14 F.C.C.R. 3160, 3201, 3207 (1999); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214*

so complex and changeable as to be inappropriate for government involvement. In addition to selling short the Commission's demonstrated ability to deal appropriately with issues that are in fact far more complex, the theory that high-speed Internet access is somehow so complex, so changeable, and so new as to defy regulatory classification or definition is at odds with over thirty years of Commission precedent, the Communications Act, and years of consistent judicial precedent.

The plain fact is that Internet access, be it dial-up, cable-based, DSL-based, or otherwise, and the transmission facilities over which it is delivered, are services that fit neatly into the existing regulatory regime that governs information services and the delivery of those services over common carrier telecommunications networks. EarthLink respectfully submits that before there can be any meaningful discussion of how to encourage rural deployment of high-speed facilities, before the issue of universal access to broadband services can be addressed, and before anyone can predict what the next "killer application" will be, the administration must make clear that it believes the statutory concept of common carriage applies to transmission facilities which are used to deliver high-speed Internet access to the public. Specifically, the Commission must state clearly whether or not it believes that the facilities-based transport capabilities that local exchange carriers and cable companies use to provide publicly offered high-speed Internet access services to their own customers are common carrier telecommunications services that those

Authorizations from MediaOne Group, Inc. to AT&T Corp., Memorandum Opinion and Order, 15 F.C.C.R. 9816, 9872 (2000).

facilities-based carriers must sell to other ISPs on nondiscriminatory terms and conditions.⁴

The reason that this clarification is so critical is that the answer will determine the conditions under which EarthLink and the vast majority of other independent ISPs, that are not themselves in the business of operating ubiquitous telecommunications networks, will be able to buy the transmission services necessary to provide Internet access services to their customers. Put differently, the issue that the FCC appears in its several overlapping proceedings to be contemplating is whether only facilities-based network owners (namely ILECs and cable MSOs) should be able to offer high-speed Internet access to the public.

The question thus stated is quite stark, and no doubt many decisionmakers would deny that any regulatory option is being considered that would result in monopoly or duopoly in high-speed Internet access markets. The plain fact is, however, that the federal government, by failing to enforce the Communications Act or even to say what it thinks the Act means with respect to Internet access provided over cable facilities, has for years allowed all but one of the nation's cable companies to refuse to provide customers a choice of

⁴ In addition to its comments (under the Mindspring name) in the merger proceedings cited in footnote 1, *supra*, EarthLink has filed extensive comments on this issue in the Commission's GN Docket No. 00-185, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* (the "Cable Open Access NOI"). See, e.g., EarthLink Cable Open Access NOI Comments (December 1, 2000); EarthLink Cable Open Access NOI Reply Comments (January 10, 2001). See also EarthLink's November 8, 2000, *ex parte* submission in the same docket (letter to FCC Cable Services Bureau Chief W. Kenneth Ferree). All of the comments of EarthLink and other parties to the Cable Open Access NOI are available electronically on the Commission's web site, www.fcc.gov. To access comments from the home page, select "search" from the tool bar at the top of the page, select the "Search for Filed Comments -- ECFS" option from the next page, enter the docket number (00-185) in the first box on the search form, then press "enter" to obtain a chronological display of filed comments.

independent ISPs offering service to the public using the same underlying transport service the cable operator uses to offer its own affiliated ISP's Internet access service to the public.⁵ These networks were built using public rights of way, were paid for by rates levied under either legally sanctioned monopolies or, later, *de facto* monopolies for cable services, and are now increasingly being used to provide tariffed common carrier telecommunications services and/or high-speed Internet access to millions of subscribers.⁶

In statements accompanying the issuance of the recent FCC rulemakings regarding DSL-based Internet service, the issue has been raised as to whether incumbent local exchange carriers, which provide over 90% of the DSL transmission capacity in this country and which built their networks almost entirely under protection of a federally granted monopoly, must continue to provide those services to ISPs and others at tariff.

Based on these inactions and statements by the Commission, it is no exaggeration to say that the government has in the case of cable *de facto* adopted, and is in the case of DSL considering, regulatory policies that, if allowed to stand, would transform open and competitive Internet access into a commercial property controlled in most markets by the one or two dominant network providers that own the ubiquitous high-speed transmission facilities needed to reach the public. If that transformation is allowed to occur, then

⁵ The sole exception is Time Warner, which is required under the terms of the FTC approval of its merger with America Online to enter into transport agreements with certain unaffiliated ISPs, of which EarthLink is one.

⁶ Congress and the Commission took numerous actions to foster the build out of cable networks, including subsidized attachments to utility poles (47 U.S.C. 224), a ban on telephone company ownership of cable networks in their telephone exchange service area (47 U.S.C. 533(b) (repealed in 1996)), and allowing exclusive franchises (Congress did not allow multiple franchises to be awarded until after 1992). New facilities based entrants do not benefit from similar protections when they enter a market today.

many legitimate and important questions raised in the Notice would simply be irrelevant. Because resolving the basic issue of access to high-speed transmission networks – an issue that can be answered simply under existing law – will determine the outcome of the more detailed questions raised by the Notice, EarthLink respectfully urges the NTIA to focus first and foremost on this fundamental question.

III. The Regulatory Regime For High-Speed or Broadband Internet Access Was Adopted Over Twenty Years Ago And Has Been Reaffirmed By The Congress In 1996 And By The Commission This Year.

Despite all of the rhetoric suggesting that the Internet and high-speed data transmission are somehow new and unforeseen developments that require the construction from scratch of a new regulatory system, the plain fact is that existing law already unambiguously provides the basic rules that govern high-speed Internet access.⁷ Accordingly, the answer to the Notice’s question of whether changes to existing law are necessary in order to properly regulate broadband services is a resounding “NO.”

The existing rules that govern the relationship between ISPs and the network owners over whose transmission facilities ISPs serve their customers are as follows: (1) Internet access service is itself an “information service” within the meaning of the Act, and as such is not regulated; (2) every facilities-based carrier that uses its own transmission facilities to provide Internet access indiscriminately to the public is required to sell the transmission used to

⁷ In fact, the Commission began the *Computer* proceedings in 1966 to address the increasing use of computers to provide both switching and data processing.

provide that Internet access to unaffiliated ISPs on non-discriminatory terms and conditions.

The rules summarized above were adopted by the Commission beginning in the late 1970s in the second of the *Computer* proceedings.⁸ In those proceedings, the Commission was faced with precisely the same situation that the Internet presents today, namely, how to deregulate and encourage innovation in “enhanced” data storage, processing, and retrieval services while ensuring that the “basic” public transmission networks over which those services are transported remain available as a neutral platform on which enhanced service providers can compete on the basis of price and service with respect to the unregulated services.

In 1979 the Commission in its *Computer II Tentative Decision* required that all “enhanced non-voice services” must be provided on a resale basis, which meant that the underlying facilities and network capacity used as the “communications pipeline”⁹ must be available to all pursuant to tariff. The Commission stated that the intent of this tariff requirement is that:

“an environment is created where the licensed transmission facilities of a carrier are available to all providers of ‘enhanced’ services on the same basis, i.e. in terms of access, interconnection, rates, etc. The common carrier transmission facility necessary for the provision of an ‘enhanced’ service becomes a separate part of the service which must be acquired pursuant to applicable tariff by any carrier entity, whether that entity is the resale entity of the underlying carrier, an existing resale carrier, or a new entrant. Since the transmission facilities must be acquired pursuant to tariff, the potential for using the transmission component of the service to subsidize a new or

⁸ See footnotes 9 and 13, *infra*, for citations to specific orders.

⁹ *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 72 F.C.C. 2d 358 (1979)(hereinafter “*Computer II Tentative Decision*”).

innovative service is substantially minimized. The isolation of the transmission component enables any carrier to provide an enhanced non-voice communications service on the same basis, without threat of unfair competitive advantage accruing to a given carrier by virtue of its control over the underlying transmission facilities. The transmission facility would be common to all entities and is removed as a competitive element of the service.¹⁰

The Commission went on to state in the *Computer II Tentative Decision* that “this structure requires the facilities of the underlying carrier to be transparent to the information transmitted and for a carrier to provide a ‘pure transmission’ service which forms the basis upon which all ‘enhanced’ services are provided.”¹¹ Foreshadowing its words in the *Final Decision*, the Commission stated further that “[t]he underlying carrier’s transmission facilities become the basic building block upon which computer facilities can be added to perform myriad combinations and permutations of processing activities.”¹² Nothing in the *Final Decision* altered the tariff requirements of the *Computer II Tentative Decision*, and in fact the Commission used almost the identical language to reiterate the requirement, saying:

“an essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced service providers are dependent on the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered. Thus, those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized. Other offerors of enhanced

¹⁰ *Id.* at 397 (¶ 73) (emphasis added).

¹¹ *Id.* at 398 (¶ 75) (emphasis added).

¹² *Id.*

services would likewise be able to use such a carrier's facilities under the same terms and conditions."¹³

After the passage of the Telecommunications Act of 1996, the Commission brought the *Computer* rules up to date by clarifying that the terms "basic services" and "enhanced services" as used in the *Computer* decisions are, respectively, equivalent to the terms "telecommunications service" and "information service" adopted by the Congress in the Telecommunications Act of 1996.¹⁴ The Commission has held on numerous occasions that Internet access is an "information service," a conclusion with which EarthLink agrees.¹⁵ Finally, the Commission in March of 2001 reaffirmed the *Computer* requirement that facilities-based network operators that provide information services (such as Internet access) over their own facilities must sell transport to other ISPs on nondiscriminatory terms:

We clarify that the requirement in *Computer II*, that carriers not subject to the separate subsidiary requirement acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are used, does not prohibit them from offering packages of telecommunications service, including interstate, domestic, interexchange service or local exchange service, and enhanced services at a single price. As long as they comply with the requirement to make their underlying transmission capacity for the

¹³ *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 *Final Decision*) at 474-475 (¶ 231) (emphasis added).

¹⁴ See *Universal Service Report To Congress*, 13 F.C.C.R. 11501, 11511; see also FCC *Amicus Brief* at 3-4 in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's determination that the test for when a service provider is a "telecommunications carrier" under the Act is the same as the test for when a service provider is a communications "common carrier." *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999). As is discussed further below, it is the common carrier status of facilities-based Internet access service providers that underlies their obligation to sell transmission capability to other ISPs.

¹⁵ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 F.C.C.R. 385, 401 (1999).

enhanced service available on nondiscriminatory terms, it is consistent with the Commission's reasoning in *Computer II* to clarify that these carriers may offer bundled packages. . . . We conclude that a natural outcome of allowing these carriers to operate on an integrated basis is that they would be able to offer packages of telecommunications and enhanced services at a single price, and indeed, there is no restriction against such packaging for these carriers in *Computer II*, provided that they comply with the safeguard to make available the underlying transmission capacity for the enhanced service.¹⁶

Applying the clear *Computer* rules to high-speed Internet access, and in particular to the relationship between network operators (be they cable transport providers or DSL providers) and ISPs, the result is that current Commission rules, which Congress codified in the Telecommunications Act of 1996,¹⁷ require every facilities-based network provider that chooses to provide Internet access using its own transmission facilities to sell the use of those transmission facilities to other ISPs on nondiscriminatory terms and conditions. It is upon this basic framework that “dial-up” Internet access was created and transformed into the ubiquitous and open network that it is today. If the broadband Internet of the future is to share the openness and flexibility of its narrowband predecessor, the universal availability to ISPs of basic transmission services must be properly recognized as the legal requirement that it is.

IV. There Is Nothing About The Nature Of Internet Access Or The Networks Of Facilities-Based Carriers That Makes The *Computer* Rules Inapplicable.

In the course of the Commission's proceeding on high-speed Internet access (GN Docket No. 00-185), a number of parties, most notably cable

¹⁶ *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, CC Docket Nos. 96-91, 98-183, at ¶ 40 (rel. March 30, 2001) (emphasis added).

¹⁷ 47 U.S.C. § 251(g).

companies that provide Internet access, have argued that the *Computer* rules, while valid and binding, do not apply to them.¹⁸ These assertions are based on two related arguments. First, the cable companies argue that the *Computer* regime only applies to common carriers, but that the cable companies are “private carriers,” not common carriers. The private carriage argument is simply and demonstrably incorrect. Setting aside that every major cable company has sought and received numerous state public utility commission authorizations to act as a common carrier competitive local exchange company, the very fact of providing the underlying transmission for their own mass market Internet access services qualifies the cable companies as common carriers.

The long-accepted test for who is a communications common carrier (and thus subject to the *Computer* rules and regulation generally under title II of the Act) was set forth by the United States Court of Appeals for the District of Columbia Circuit in two cases of the same name, *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (“*NARUC I*”), and *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (“*NARUC II*”). Under the *NARUC* test, a provider of communications services is a common carrier if it holds itself out indiscriminately to the public to “transmit intelligence of [the customer’s] own design and choosing.” *NARUC II*, 533 F. 2d at 609 (citation to FCC order omitted). There can be no question as a factual matter that the Internet access

¹⁸ The cable companies also continue to argue that their Internet access services and the transmission underlying those services are “cable services” as defined by the Act, and are thus not subject to any title II regulations. Every appellate court that has reviewed this claim has concluded that Internet access provided over cable facilities does not qualify as a “cable service” as defined by the Communications Act.

services offered by cable companies to their customers are offered indiscriminately to the public. Indeed, millions of subscribers take these services on standard terms and conditions. It is equally without question that the transmission services underlying such Internet access services provide the capability to transmit intelligence of the customers' "own design and choosing." *Id.* Under the NARUC test, therefore, cable companies that offer Internet access over their own facilities are common carriers, and they are subject to the *Computer* requirement that they sell their underlying transmission services to other ISPs.¹⁹

Despite the fact that the *NARUC* test clearly brings the transmission underlying cable Internet access within the range of common carrier activity, the cable companies have also argued that they are not telecommunications carriers because they provide only an "information service" – and do not offer any stand alone "pure transmission" service – to their Internet access customers. The Commission has flatly rejected this and related arguments every time a common carrier has offered a similar argument over the years.

The first reason that the "pure transmission" argument fails is that there is simply no authority for the underlying premise that only "pure transmission" services trigger common carrier obligations. The cable industry cites for support to the Commission's *Universal Service Report to Congress*, 13 F.C.C.R. 11501 (1998), but the Commission stated in that very document that "[w]e

¹⁹ It is of more than passing interest that the services that were found to be common carrier services in *NARUC II* were "two-way, point-to-point, non-video communications" provided by cable companies. 533 F.2d at 605.

express no view in this Report on the applicability of this analysis to cable operators providing Internet access services.” *Id.* at 11535 n. 140.

Second, as is noted above, the Commission in the *Computer II Tentative Decision*, which was adopted in the *Final Decision*, ruled that “this structure requires the facilities of the underlying carrier to be transparent to the information transmitted and for a carrier to provide a ‘pure transmission’ service which forms the basis upon which all ‘enhanced’ services are provided.” *Computer II Tentative Decision* 72 FCC 2d at 398 (¶ 75) (emphasis added). The cable industry’s argument that it does not provide “pure transmission” and that cable companies therefore are not common carriers, thus amounts to an argument that the industry is not bound by the law simply because it refuses to obey it. To EarthLink’s knowledge such an approach has not historically been favored by the courts.

The final reason (also provided by Commission precedent) that the “pure transmission argument” fails is that it is an attempt by another name to apply the “contamination theory” to cable networks used for Internet access. The “contamination theory” is the name given to the concept that, with respect to information service providers that buy common carrier transmission services from unrelated parties, the information or enhanced service “contaminates” the underlying common carrier transport service so as to remove the entire combined service from title II regulation.²⁰ This is the mechanism by which the Commission in the *Computer* decisions avoided application of common carrier regulation to information service providers that did not use their own networks to reach their enhanced service customers. The problem with the cable

industry's attempt to apply the contamination theory to their Internet access services is that the Commission has expressly and repeatedly refused to apply that theory to facilities-based carriers. In *Frame Relay*, the Commission explained:

Moreover, application of the contamination theory to a facilities-based carrier such as AT&T would allow circumvention of the Computer II and Computer III basic-enhanced framework. AT&T would also be able to avoid Computer II and Computer II unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result.

Frame Relay, 10 F.C.C.R. at 13723. This rule, that facilities-based carriers that also provide information services must sell their underlying transmission capabilities to other information service providers, applies with equal force to cable facilities used to offer Internet access to the public and facilities-based local exchange companies offering Internet access over DSL. In both cases, the long-established *Computer* rules govern.

Despite the fact that these rules are clear and familiar both in content and in application, despite the fact that these rules have provided the regulatory platform that allowed development of the existing multiple ISP model for dial-up and DSL-based Internet access, and despite the fact that EarthLink and others have for years been asking the Federal Communications Commission simply to acknowledge that these rules exist and apply to broadband Internet services, the public and the industry find themselves today in a situation where there are at least three open dockets that may (or may not) address these issues, with a fourth promised. Regulators, often no doubt with the best of intentions, are creating uncertainty by asking questions such as

²⁰ See *In the Matter of Independent Data Manufacturer's Association, Inc.*, 10

“What is broadband?” Instead of asking such questions, regulators, the industry, and the public need first to ask what the law is today and whether broadband carriers that provide Internet access over their own networks are complying with that existing law. Until there is some public and official acknowledgement that common carriers will be held to their Communications Act obligations, there can be no meaningful progress on the finer points of broadband policy.

V. The Key to Greater Use Of The Broadband Internet Is The Certain Availability Of Transmission Services To Independent ISPs.

The Notice focuses more on the construction of additional broadband facilities than it does on applications that run over those facilities. EarthLink believes that this focus reflects a common misperception about the driving force behind broadband Internet access. Specifically, because broadband facilities are already physically available to the vast majority of Americans, with further buildouts well underway by telephone and cable companies, the current limiting factor on broadband subscribership is a shortage of competition in the broadband Internet access market at the ISP level, not a lack of transmission facilities. That shortage of competition is caused almost entirely by the unlawful refusal of cable companies to sell transmission capacity to independent ISPs, coupled with the dilatory practices of certain ILECs which seek to emulate such anticompetitive behavior by leveraging their monopoly ownership of telecommunications facilities into control of broadband internet access as well. If incumbent local exchange carriers were similarly allowed to

F.C.C.R.13717, 13719 (1995) (hereinafter “*Frame Relay*”).

restrict or forbid the use of their DSL facilities by independent ISPs -- a suggestion that has been made seriously both on Capitol Hill and at the Commission -- then any remaining "competition" would be limited to the duopoly control of the broadband market by incumbent local exchange carriers and cable companies.

In a recent speech about the broadband Internet, FCC Chairman Michael Powell recognized the disparity between the availability of broadband facilities and the rate at which consumers are subscribing to broadband services. In his October 22, 2001 remarks at the National Summit on Broadband Deployment, the Chairman noted that:

According to J.P. Morgan, 73% of households have cable modem service available, and 45% of households have access to DSL. Combined, broadband availability is estimated to be this year almost 85%. The intriguing statistic is that though this many households have availability, only 12% of these households have chosen to subscribe.

As the Chairman stated in his remarks that followed this passage, there may be many reasons why broadband Internet access, although widely available, has not yet been more fully adopted. Among these, high price and the lack of broadband "killer applications" are two leading reasons why more people have not subscribed to broadband Internet access services. As the Commission and the Congress have repeatedly found over the years, competition is the key to lower prices, greater innovation, and better service. As EarthLink notes above, however, the competition that will lead to these results in the broadband Internet access market will not occur if the one or two transport facility owners in most markets act as toll booths to determine who gets on the information superhighway. The competition that will allow broadband Internet access to eclipse even the phenomenal success of

narrowband Internet access is competition among multiple ISPs at the retail level. In order for that competition to begin and thrive, however, the basic transmission building block that independent ISPs need to serve their customers must be available on nondiscriminatory terms and conditions.

VI. Conclusion

In order for the nation to realize the promise of broadband Internet access, it is imperative that independent ISPs are allowed to have access on nondiscriminatory terms and conditions to the underlying transport networks that connect individual homes and businesses. More specifically, it is imperative that facilities-based providers of DSL and cable transmission services be required to fulfill their clear common carrier obligations to sell transport to independent ISPs on the same terms on which they sell that transport to themselves and their affiliates for use in their own Internet access operations. Once that longstanding obligation is clarified and enforced, there will in fact be a competitive market for high-speed Internet access services, just as there has been in the narrowband Internet access service market. As a result, the Commission will be able to continue its successful recipe of avoiding regulation of information services by making sure that the basic underlying telecommunications services over which those information services travel remain open and available to all who pay for them. EarthLink respectfully urges the NTIA to use all of the tools at its disposal to encourage that result.

Respectfully submitted,



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December 19, 2001