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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Performance Measurements and Standards for Interstate Special Access Services	)	CC Docket No. 01-321
	)	
Petition of U.S. West, Inc. for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U.S. West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
	)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

REPLY COMMENTS OF EARTHLINK, INC.

I. Introduction and Summary

EarthLink, Inc. ("EarthLink"), by its attorneys, files these Reply Comments in the above-referenced proceeding to stress the importance of effective special access performance measures to promote competition and efficient services for all competitors in the communications marketplace, including Internet Service Providers ("ISPs"). EarthLink is the largest broadband

ISP in the United States today that is independent from facilities-based holders. EarthLink provides both narrowband and broadband Internet access services to over 4.7 million residential and business customers, including over 200,000 customers presently served with high-speed Digital Subscriber Line ("DSL") services. Special access services are a necessary component of the facilities EarthLink uses to deliver consumers both narrowband and broadband Internet access. Among other purposes, special access services form the backhaul component of EarthLink's network, bringing Internet traffic from the telephone central offices to the points of presence ("POPs") of EarthLink or its vendors. For example, EarthLink purchases significant amounts of special access services from incumbent telephone companies, including ATM, Frame Relay, DS-3, and OC-3. In addition, vendors serving EarthLink often must rely on such high-capacity special access services from incumbent telephone companies to provision data transport to EarthLink.

Slow and unreliable provisioning of these services by incumbent LECs ("ILECs"), whether acquired by EarthLink directly from the ILEC or through an alternative carrier that in turn is reliant upon the ILEC, impedes EarthLink's ability to provide high-quality services and to enter new markets quickly and effectively. These failures diminish consumer welfare by limiting end-user choice of ISP, thwarting the introduction of new services and creating obstacles to consumer satisfaction.

Especially given the importance of broadband services, the FCC should also adopt performance metrics for DSL services, which have been consistently classified by the FCC as interstate special access services. Doing so will enhance broadband deployment through the promotion of reliable, efficient and competitive DSL-based Internet services.

II. Discussion

A. The Majority Of Commenters Agree That Special Access Performance Metrics Will Enhance Competition And Improve Consumer Welfare

The majority of the commenting parties, including competitive carriers, customers, and state regulatory authorities, have detailed the need for performance metrics for special access services. These parties stress, for example, that while competition for special access services may emerge, even in the most competitive markets, the level of competition is insufficient to constrain prices or improve carrier performance.[1] ILECs often provide the only practical means of obtaining high capacity customer connections, especially for customers that might not otherwise have sufficient traffic to justify construction and related costs by competitive LECs ("CLECs"), even assuming a CLEC exists as a viable option in the relevant geographic area. In fact, even when a user such as EarthLink does rely upon a CLEC for its telecommunications needs, in the majority of circumstances, the CLEC must nonetheless rely upon the ILEC for critical components, including high capacity loops and dedicated transport.

As a practical matter, special access provisioning is plagued by poor service and lengthy delays, not only in the initial ordering and installation, but also in maintenance and repair functions. Such poor performance not only impedes EarthLink in its ability to plan and deploy the information services which are dependent upon special access inputs, it can result in consumer complaints as EarthLink is blamed for the lack of available facilities necessary to provide high quality Internet access services.

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[1] *See e.g.*, Comments of Ad Hoc Telecommunications Users Committee ("Ad Hoc"), at 6-7; Comments of State of New York Department of Public Service, at 1; Comments of Time Warner Telecom and XO Communications, Inc. at 2-11.

In short, as EarthLink seeks to provide its customers with reliable, efficient service, it is ultimately dependent upon the ILECs who appear to have little incentive to improve service. Indeed, given that most of the large ILECs have business entities that compete with EarthLink, and compete directly with the CLEC suppliers from which EarthLink obtains service, it is not surprising that the ILECs may even have a disincentive to improve performance.

Under these circumstances, a limited but clear set of performance metrics and attendant reporting obligations will well serve the public interest in efficient, reliable and competitive services. Not only will customers and their suppliers be able to assess the relative performance of the ILECs in providing, maintaining and repairing services, they will be able to adjust their expectations (and those of their end-user customers) to be consistent with actual provisioning performance.

In this regard, the proposal of the Joint Competitive Industry Group[2] provides a cohesive structure for the FCC's consideration, as do the proposals of others.[3] To achieve the full benefits of such a system, it is also particularly important for the FCC to define with precision the relevant metrics, terminology and intervals (e.g., when an "order" is placed, when a service is "provisioned," etc.). EarthLink further agrees with those parties that urge the Commission to consider not only whether the provisioning intervals are non-discriminatory as between ILECs and other carriers, but also whether the proposed provisioning periods are reasonable.[4] As a customer that uses special access services as an input to its information services, EarthLink must

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[2] *See* Ex Parte Filing of the Joint Competitive Industry Group, dated January 18, 2002, filed January 22, 2002.

[3] For example, ALTS suggests specific rules for reporting, Comments of ALTS at 9-17. ALTS, AT&T and others further suggest escalating penalties for continued noncompliance, *see e.g.*, Comments of ALTS at 11, Comments of AT&T at 41.

be guided by what the market will bear; even if the ILEC provisioning is equally slow for its affiliated and unaffiliated entities, competition (and the innovation and efficiencies it brings) and the public interest is still not well-served by needless delays. Indeed, EarthLink urges the Commission to recognize that the performance metrics should not be limited solely to provisioning to *carriers* as not all special access consumers are carriers. To this goal, EarthLink agrees that the FCC can and should require performance metrics and attendant refunds in special access tariffs.[5]

Critically, a uniform and specific set of performance metrics will promote a streamlined and workable enforcement process. Rather than requiring parties to undertake time-consuming and costly complaint proceedings, in which the FCC would have to grapple on a case-by-case basis to determine the lawfulness of the carrier's provisioning, the institution of metrics (and attendant ILEC reporting) will simplify greatly the process. EarthLink proposes that the FCC consider, at a minimum, establishing a presumption of unreasonableness if there has been non-compliance. While the FCC may still be required to adjudicate whether the failure to comply with the standards was reasonable in particular instances, parties will not be faced with the uncertainty and enormous evidentiary burdens that exist today. In fact, it is likely that the ease with which a metrics-based complaint could be brought would serve as a strong deterrent to non-compliance and will spur better service.

B. DSL Special Access Services Should Be Subject To Performance Standards And Reporting Requirements

The Commission has reiterated the increasingly important role of broadband services to

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[4] *See e.g.,* Comments of Ad Hoc at 6-7.

[5] Comments of ALTS at 13.

the economy and to our everyday lives.[6] EarthLink agrees that the public interest is well-served by the efficient, reliable and competitive deployment of broadband services and stresses the key role that ISPs have in delivering broadband-based services to consumers. The FCC should acknowledge that rather than the carriers, it is the ISPs that offer and provide end-user broadband subscribers the emerging broadband Internet access services. It is the ISPs, whether LEC-affiliated or independent, that market, price and deliver the broadband Internet access services and that determine the various features of the broadband information service. To do so, however, the ISP must obtain from the ILECs the broadband telecommunications input.[7] As such, if consumers are to obtain services reliably, it is imperative that ISPs have access to the needed wholesale broadband telecommunications DSL service inputs on a reliable, timely basis.

As some commenters have noted, the FCC should adopt special access performance metrics that embrace DSL services in this proceeding.[8] The FCC has repeatedly classified DSL services as within the special access category of interstate access services;[9] and indeed, DSL

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[6] *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, FCC 01-360, CC Dkt. No. 01-337, at ¶ 4 (rel. Dec. 20, 2001); *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et seq.*, Notice of Proposed Rulemaking, FCC 01-361, CC Dkt. No. 01-338 (rel. Dec. 20, 2001).

[7] EarthLink recognizes that some CLECs may also offer DSL inputs to ISPs. As a practical matter, however, for national or regional ISPs to offer ubiquitous service, it is essential today to obtain services from the ILECs.

[8] *See* Comments of DIRECTV Broadband Inc. at 2-7.

[9] *See e.g., In the Matter of GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148,* Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998); *In re Deployment of Wireline Service Offering Advanced Telecommunications Capability*, Order on Remand, CC Docket No. 98-147, 15 FCC Rcd. 385, ¶ 45 (1999), *reversed and remanded on other grounds*, WorldCom v. FCC, Case No. 00-1002 (D.C. Cir. rel. Apr. 20, 2001). *See also, In the Matter of Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶39 (1999) (noting "special access tariffs such as the GTE DSL tariff").

services are included in special access portions of LEC tariffs. Most significantly, these "new" special access problems have been plagued by the provisioning delays, poor service and maintenance and repair problems that the FCC seeks to examine in this proceeding. While the FCC and others have noted that consumer acceptance play a critical role in the speed that broadband services are actually deployed,[10] the fact is that unwarranted delays and service problems are counter to consumer satisfaction. However much ISPs urge consumers to "be patient" and try to compensate for missed provisioning dates, service outages and repeated trouble tickets, the fact remains that ISPs are wholly reliant upon the carriers for the wholesale DSL input.

The FCC should adopt a clear set of DSL performance standards and require regular reporting of key metrics, including provisioning (intervals, past due orders, etc), maintenance and repair data, just as it has proposed for other special access services. The FCC should also set forth specific expectations regarding enforcement, adopting a presumption of unreasonableness for violation. These performance measures and requirements should provide data sufficient to assess discrimination between affiliated and non-affiliated wholesale customers, especially given the aggressive stance ILEC-affiliated ISPs have taken in the marketing of DSL services and repeated allegations of discrimination.[11] Moreover, the metrics should provide criteria regarding

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[10] *See e.g., Deployment of Advanced Telecommunications Capability*, Third Report, CC Dkt. No. 98-146, FCC 02-03, at ¶ 118 (rel. Feb. 6, 2002); "Removing Roadblocks to Broadband Deployment," Nancy J. Victory, Assistant Secretary for Communications and Information, U.S. Department of Commerce, Dec. 6, 2001.

[11] *See e.g.,* Reply Comments of Texas Internet Service Providers Association, CC Docket Nos. 95-20, 98-10 (filed April 30, 2001); Reply Comments of United States Internet Service Providers Alliance, CC Docket Nos. 95-20, 98-10 (filed April 30, 2001); Reply Comments of the California Internet Service Providers Association, Inc., CC Docket Nos. 95-20, 98-10 (filed April 30, 2001).

reasonable provisioning, maintenance and repair intervals, separate from issues of discrimination, so that ISPs can assess their services, plan accordingly and keep their customers adequately and fully informed as to reasonable rollout expectations.

As stated above, these steps will greatly assist in effective enforcement and will directly further the broadband goals the FCC consistently touts.

III. Conclusion

EarthLink strongly urges the Commission to adopt meaningful provisioning standards for special access services, including wholesale DSL services. Reliable and predictable special access provisioning is essential to promote competition in the telecommunications and Internet services markets. Regulatory oversight of such provisioning is essential until competitive special access is, in fact, a reality in the market.

Respectfully Submitted,

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Dated: February 12, 2002

Certificate of Service

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