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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10

COMMENTS OF EARTHLINK, INC.

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COMMENTS OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys, files these comments in the above-captioned rulemaking proceeding to review the appropriate legal and policy framework for broadband access to the Internet over the existing and future wireline telephone network.[1] EarthLink urges the Commission to put the interests of American consumers first by providing for efficient and transparent advanced telecommunications access between end-users and Internet service providers ("ISPs"). To do so, *Computer III* rules may be revamped and made more effective, but should not be abandoned. Incumbent local exchange carrier ("LEC") provision of wholesale DSL and other advanced services to competing ISPs is a common carrier service and must be regulated as such.

Introduction and Summary

EarthLink is the nation's largest independent ISP, with over 532,000 broadband Internet access subscribers among its approximately 4.9 million total subscribers. Since 1998, EarthLink has actively pursued the rollout of broadband services via DSL, and other platforms including incumbent LEC wholesale DSL. Today, hundreds of thousands of American consumers use EarthLink's DSL-based Internet services, and EarthLink is enjoying aggressive growth of its broadband subscriber base. EarthLink and many other ISPs bring broadband home to the American consumer.

Americans currently enjoy widespread choice and abundant services from competing ISPs, and the success of broadband depends vitally on rules of ISP access to broadband transmission that promote efficiency, transparency and certainty. Just as the Commission found in *Computer Inquiry*, the regulatory goals of nondiscriminatory treatment and efficient access of information providers to underlying telecommunications create the framework for a vibrant Internet teeming with ISPs that are accessed via the incumbent LEC network. Similarly, the full promise of broadband lies in diverse services, prices, content and features that ISPs and other providers make available, as does the ease by which Americans can connect to new and richer information and applications.

Currently, wholesale DSL is the telecommunications service that many ISPs use to provide American consumers with high-speed Internet access. The Commission has confirmed several times that the incumbent LECs' wholesale DSL offerings are "telecommunications services" under the Communications Act regardless of the purchasing entity. This is consistent

[1] Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, FCC No. 02-42 (rel.

with settled common carrier precedent. It is also settled that ISPs, as such, are not providers of "telecommunications" or "telecommunications services." Rather, all ISPs, including those affiliated with incumbent LECs, are unregulated providers of "information services" that compete on the basis of prices, content, features and customer service.

Further, incumbent LECs have continuing common carrier obligations. As common carriers, they cannot simply be declared to be private carriers. Under *NARUC I* and Commission precedent, incumbent LECs offer wholesale DSL on a common carrier basis, and not on a private carriage basis. Further, as incumbent LECs have offered this common carrier service for years and EarthLink and other ISPs are serving thousands of end-users via incumbent LEC DSL, Section 214 of the Act would also preclude these carriers from discontinuing the service offering in an effort to transform it into a private carriage offering. The public interest requires that carriers engaged in serving the public continue to offer such services in conformity with common carrier obligations.

Not only does the Act and FCC precedent require that wholesale DSL be regulated on a common carrier basis as a "telecommunications service" under Title II, but a decision to the contrary would also be inimical to the FCC's and Congress's goals of widespread deployment of advanced services. Competition drives ISPs to offer widely diverse services, functionalities, and terms to consumers. An effort by the FCC to deregulate wholesale DSL transmission service would enable DSL carriers to discriminate among ISPs, refusing to provide DSL access to independent ISPs while offering favorable terms for such service to their own affiliated ISPs, thereby increasing market share until all DSL broadband Internet access customers were served by carrier-affiliated ISPs. In short, a consumer who wanted DSL would be forced to sign up

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Feb. 15, 2002) ("NPRM").

with the ILEC-affiliated ISP. Because intermodal competition (between cable, DSL, and wireless) has not yet fully developed and may not fully develop, deregulating wholesale DSL would put an abrupt end to broadband competition in this country.

In order to promote broadband competition, the Commission should continue to supply *Computer II* principles of non-discriminatory access to transmission services, regardless of the "next generation" networks under consideration. Further, the Commission may consider revamping and streamlining *Computer III* requirements for the Bell Operating Companies' ("BOCs") DSL and advanced services to make them more effective and yield more value to the public. EarthLink believes that five key broadband obligations (discussed herein) would increase public choice of Internet services offered via DSL by streamlining and updating the *Computer III* obligations to improve the nondiscriminatory and transparent provisioning of wholesale DSL access. Better enforcement of these ISP rights -- with mechanisms such as performance metrics and burden shifting -- would also yield greater compliance and increased certainty in the terms of access.

Further, the Commission should clarify that USF practices of incumbent LECs must be nondiscriminatory. When incumbent LECs sell DSL services to ISPs, they must apply the same USF pass-through treatment to all ISPs, both affiliated and unaffiliated. The Commission should clarify that incumbent LECs may not violate their duty to be reasonable and nondiscriminatory by charging USF pass-through to unaffiliated ISPs while allowing their affiliated ISPs to obtain DSL without any USF pass-through charges.

Finally, EarthLink believes that the Commission should not exercise its Title I authority in a manner inconsistent with the Commission's long-standing unregulation of the ISP industry.

By continuing to regulate incumbent LEC DSL services under Title II, the Commission would avoid raising many issues regarding the limits of its Title I authority to subject ISPs to a host of Title II-like obligations, such as USF, CALEA, and CPNI regulation. In any case, Title I regulation would be unjustified if applied to the thousands of ISPs unaffiliated with incumbent LECs.

Discussion

I. Wholesale Advanced Telecommunications Services of Incumbent LECs Should Continue to Support Consumer Choice for of ISPs.

EarthLink agrees with the tentative conclusion of the NPRM (¶ 17) that broadband Internet access service is an "information service," including those services offered by the incumbent LEC-affiliated ISPs, such as BellSouth.net and Verizon Online. As has been the case since the Commission's *Computer II* decision, all ISPs are unregulated providers with respect to their information services.[2] The transmission services underlying those information services, however, have always been regulated. However the issue of the proper statutory classification of facilities-based transmission underlying Internet access services may be resolved, wholesale DSL presents a simple and obvious classification question. Wholesale DSL sold by incumbent LECs to ISPs for the past four years is a not an "information service" and should not be wrongly characterized as such. Wholesale DSL is a "telecommunications service" sold by incumbent LECs to affiliated and unaffiliated ISPs, regardless of whether or not it is later used as a "self-provisioned" telecommunications input for the affiliated ISP's information service. Moreover, the wholesale DSL of incumbent LECs cannot be re-classified or altered at this time to fit the

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision, 77 F.C.C. 2d 384 (1980) (*"Computer II"*).

"private carriage" category, due to the nature of the service and the vital need for common carrier regulation of such services.

A. Incumbent LECs Provide Wholesale DSL "Telecommunications Service;" ISPs Provide Retail "Information Service"

1. Internet Access Service is an "Information Service" Regardless of the Transmission Method -- As the NPRM (¶¶ 17-24) notes, the provision of Internet access services via a wireline broadband connection is an "information service." The FCC has explained this analysis repeatedly,[3] and there seems to be little debate that Internet access "offer[s] more than a transparent transmission path to end-users and offer[s] enhanced capabilities." NPRM ¶ 20. This is true both narrowband transmission service (dial-up) and broadband transmission service (DSL).[4] As discussed below at Section I(C), ISPs offer a host of information functionalities under the rubrick "Internet access" that includes, but is not limited to, email, web access, instant messaging ("IM"), chat rooms, content-based services (such as news, weather, music, stock quotes, etc.), web-hosting, access to software or games, and more.

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[3] *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶¶ 66-68 (1998) (*"USF Report to Congress"*); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶ 3 (1999) (*"Advanced Services Second R&O"*) (ISPs are "unregulated information service providers" that will be able to "package the DSL service with their Internet Service to offer affordable, high-speed access to the Internet to residential and business customers"); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012, ¶ 37 (1998) (*"Advanced Services MO&O"*).

[4] *In the Matter of Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services*, Order, 11 FCC Rcd. 6919 (1996) (approving Bell Atlantic's ability to offer unregulated dial-up Internet access by complying with CEI parameters) (*"Bell Atlantic Internet Access Order"*); *Advanced Services MO&O*, ¶ 37 (BOCs may offer information services via DSL, so long as BOCs comply with *Computer Inquiry* requirements).

With broadband, the users experiences an always-on connection and higher data throughput rates, which allows the ISP, in turn, to offer high-speed information services in addition to the full suite of services enabled via a narrowband connection.[5] For example, broadband connections permit ISPs to offer their customers access to video streaming sources, music downloads that are quick and reliable, pictures, interactive games, and a whole panoply of content and functionality that is either impractical or impossible with a narrowband connection. Broadband can enable a host of other "bundled value-added services, including voice, entertainment, e-commerce and home management and control."[6] Since a broadband ISP is "generating, . . . storing, . . . or making available information," and since these functions are in addition to the suite of narrowband ISP services, Internet access via broadband transmission is an "information service" under Section 3(20) of the Act.[7]

Incumbent LECs also offer narrowband and broadband Internet access "information services", typically through a wholly owned ISP subsidiary. Examples of these incumbent LEC "information service" providers include BellSouth.net[8] and Verizon Online.[9] While these affiliated ISP information services rides over the PSTN facilities owned by the incumbent LEC,

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[5] National Research Council, "Broadband: Bringing Home the Bits," at 65-77 (2002) (*"Bringing Home the Bits"*). According to one study, broadband users perceive that the many alternative versions of DSL, from ADSL to HDSL, "make DSL by far the most 'flexible' broadband service available." Cahners In-Stat Group, Moving Towards Broadband Ubiquity in U.S. Business Markets, at 21 (April 1, 2001) (*"Moving Towards Broadband Ubiquity"*).
[6] *Moving Towards Broadband Ubiquity* at 13.
[7] 47 U.S.C. § 153(20).
[8] http://services.bellsouth.net/external/avail.html
[9] http://www.verizon.net/pands/dsl/

the affiliated ISP is an "information service" provider, and has been treated as such by the FCC.[10]

2. All Internet Service Providers are Unregulated -- Since the Commission's *Computer II* decision, all ISPs -- including those affiliated with ILECs -- have been unregulated by the FCC with respect to the offering of information services.[11] Beginning in 1980, the Commission established a distinction between "enhanced" services and "basic" services. One purpose of this distinction was to eliminate regulatory barriers to entry into the enhanced services market, and to encourage a variety of services in the market through robust competition.[12] This competition is "intramodal" because all ISPs, affiliated and unaffiliated, use the PSTN to communicate with end-user subscribers. The "unregulation" of ISPs continues to be one cornerstone of *Computer Inquiry* precedent.[13]

Incumbent LEC-affiliated ISPs are also unregulated providers of Internet access services pursuant to the *Computer II* and *Computer III* precedent.[14] Thus, while the incumbent LEC owns and controls the network that ISPs use, the affiliated ISP operates with as much freedom from FCC regulation as any other ISP in the marketplace. At the same time, the federal Title II and *Computer Inquiry* obligations, as well as state regulatory requirements, apply to incumbent LECs' telecommunications services, including (and especially in the case of the *Computer Inquiry*) those used to transmit information services. Thus, for example, one focus of *Computer*

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[10] *Bell Atlantic Internet Access Order*, ¶ 1 ("a carrier is permitted to offer unregulated, enhanced services if it files a CEI plan . . .").
[11] *In the Matter of Amendment of Section 64.702 of the Commission's Rules,* Final Decision, 77 F.C.C. 2d 384 (1980) (*"Computer II"*).
[12] Id. at 387 (¶ 6).
[13] J. Oxman, "The FCC and the Unregulation of the Internet," FCC OPP Working Paper Series at 11-12 (July 1999).

II and Computer *III* has been to implement non-discriminatory access to telecommunications components for all ISPs.[15] In this way, incumbent LEC Internet access services are subject to the same level of regulation as that of EarthLink's Internet access service, regardless of the transmission mode it employs.

3. Wholesale DSL Service Provided by Carriers to ISPs is a "Telecommunications Service" -- The Commission has held repeatedly that wholesale DSL service is a "telecommunications service." For more than four years, incumbent LECs have offered DSL "telecommunications services" to ISPs as an input for broadband Internet access services. On May 15,1998, GTE Telephone became the first incumbent LEC to offer ADSL service under federal tariff so that ISPs could "provide their end user customers with high-speed access to the Internet."[16] In the *GTE DSL Order* (¶ 20), the Commission found GTE's DSL offering was a "telecommunications service," and that the Commission had "ample authority" under Title II of the Communications Act to investigate these services and to act on potentially anti-competitive activities.[17] Several incumbent LECs followed GTE's lead and offered DSL telecommunications services to ISPs in their respective federal access tariffs, and after tariff investigations the

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[14] *Bell Atlantic Internet Access Order*, ¶ 1; *Advanced Services MO&O*, ¶ 37.
[15] *In the Matter of Amendment of Sections 64.702 of the Commission's Rules,* Report and Order, 104 F.C.C. 2d 958 (1986) (*"Computer III"*).
[16] *In the Matter of GTE Telephone Operating Cos.*, Memorandum Opinion and Order, CC Dkt. No. 98-79, FCC 98-292, ¶¶ 1, 8 (rel. Oct. 30, 1998), *reconsideration denied*, Memorandum Opinion and Order, FCC 99-41 (rel. Feb. 26, 1999) (noting the introduction of GTE ADSL service through federal access tariff amendment, GTOC Transmittal No. 1148) ("*GTE DSL Order*").
[17] *See, e.g., GTE DSL Order,* ¶ 32 and n. 111 ("We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable," citing 47 U.S.C. §§ 204-205).

Commission affirmed the approach of the *GTE DSL Order*, holding that "the ADSL service offerings at issue here are interstate services . . . properly tariffed at the federal level."[18]

In the 1998 *Advanced Services MO&O*, the Commission again held unequivocally that advanced services offered by incumbent LECs, including DSL, "are telecommunications services."[19] Having stated this, the very next paragraph of the Commission's order recognized that Bell Operating Companies would engage in "self-provisioning" by providing DSL services "that underlie the BOCs' own information services." Significantly, the Commission held that "BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the *telecommunications services* utilized by the BOC information services."[20]

In the 1999 *Advanced Services Second R&O*, the FCC again found that:

> *bulk DSL services sold to Internet Service Providers . . . are telecommunications services*, and as such, incumbent LECs must continue to comply with basic common carrier obligations with respect to these services. These obligations include: providing such DSL services upon reasonable request; on just, reasonable, and nondiscriminatory terms; and in accordance with all applicable tariffing requirements.[21]

Again, in the 2001 *CPE/Enhanced Services Unbundling Order*, the Commission stated unequivocally that DSL services provided to affiliated and unaffiliated ISPs were subject to the Title II authority of the FCC:

> The internet service providers require ADSL service to offer competitive internet access service. We take this issue seriously, and note that all carriers have *a firm obligation*

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[18] *In the Matter of Bell Atlantic Telephone Co., et al.*, Memorandum Opinion and Order, CC Dkt. No. 98-168, et al., FCC 98-317, ¶ 14 (rel. Nov. 30, 1998).
[19] *Advanced Services MO&O*, ¶¶ 35-36.
[20] *Advanced Services MO&O*, ¶ 37 (emphasis added).
[21] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶ 21 (1999) (*Advanced Services Second R&O*") (emphasis added).

> *under section 202 of the Act* to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers. . . . In addition, we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice *under section 201(b) of the Act.*[22]

The Commission has repeatedly held that wholesale DSL is a "telecommunications service" because the offering meets the statutory three-prong test of a "telecommunications service."[23] *First*, and consistent with the incumbent LEC DSL tariffs, DSL service is a "transmission" service between the end-user's NID (network interface device, such as a DSL modem) and the DSLAM at the incumbent LEC's serving wire center.[24] DSL service is not Internet access service; by itself, DSL does not connect the end-user to the Internet, it does not transform or offer information, and does not provide, on its own, access to information sources or any other user of the Internet. Indeed, in order for ISPs to connect with end-users and offer Internet access, the ISPs must also purchase a data aggregation telecommunications service (typically ATM or Frame Relay) that takes traffic from the DSLAM to the ISP's point of interconnection.

Second, wholesale DSL is also a telecommunications offering that incumbent LECs "offer directly to the public," NPRM ¶ 26, because the incumbent LECs offer it indiscriminately

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[22] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets,* Report and Order, 16 FCC Rcd 7418, ¶ 46 (2001) ("*CPE/Enhanced Services Unbundling Order*") (emphasis added).
[23] 47 U.S.C. § 153 (43), (46).
[24] *See, e.g.,* Verizon Telephone Companies Tariff F.C.C. No. 20, §5.1.1 (D) (diagram description of DSL service components); BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1, §§7.217 (A).

to all ISPs, network providers, and carriers.[25] By offering the service indiscriminately in federal access tariffs for almost five years to any purchasers, the incumbent LECs have chosen to offer the DSL service "to the public." Incumbent LEC tariffs specify that the service is not limited only to ISPs, but is available to all ISPs and other purchasers.[26] The fact that ISPs use the service as an input for an information service, however, does not undermine the common carrier classification of the service, since all ISPs may purchase it.[27] As the Commission recently observed, "under *NARUC I*, a carrier offering its services only to a legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class."[28] Further, the Commission has previously held that "common carriers' customers need not be 'end users,'"[29] that "some telecommunications services are wholesale services,"[30] and that "neither the Commission nor the courts . . . has construed 'the public' as limited to end-users of a

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[25] State of Iowa v. FCC, 218 F.3d 756 (D.C. Cir. 2000) (indiscriminate offering of telecommunications to restricted class of customers may constitute common carriage offering); Virgin Islands Telephone v. FCC, 198 F.3d 921, 924 (D.C. Cir. 1999) (After the 1996 Act, the FCC has held that "a carrier has to be regulated as common carrier if it 'will make capacity available to the public indifferently' or if 'the public interest requires common carrier operation of the proposed facility,'" *citing, Cable & Wireless, PLC*, 12 FCC Rcd. 8516, ¶¶ 14-15 (1997)).
[26] *See, e.g.*, BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1, § 7.2.17(A) (BellSouth ADSL service is "made available to Network Service Providers" that "includes Internet/Intranet Service providers (ISPs), Competitive Local Exchange Companies, etc.").
[27] Under the Act, a provider of "telecommunications service" is a "telecommunications carrier" which is "treated as a common carrier under this Act." 47 U.S.C. § 153(43), (46).
[28] *In the Matter of Federal-State Joint Board on Universal Service*, Order on Remand, 16 FCC Rcd. 571, ¶ 7 (2000).
[29] *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 785 (1997). *See also*, Virgin Islands Telephone, 339 F.3d at 928 (in examining whether the "to the public" portion of the statutory test has been met, the court affirmed the FCC's approach of employing "the *NARUC I* test of whether there is an offering of 'indiscriminate service' to the public, leaving open the possibility of characterizing a type of wholesaler as a common carrier").
[30] *In the Matter of Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, ¶ 264 (1996).

service."[31] By contrast, the Commission has found that a hallmark of "private carriage" is that the provider does not offer service indiscriminately, but only offers transmission on a case-by-case basis to a restricted class or a few users.[32]

Finally, incumbent LECs provide DSL service "for a fee" set by the carriers themselves. The wholesale DSL rates are publicly available, and have generally been subject to treatment under the "price caps" regime. Notably, however, rate regulation has been far from onerous; no formal FCC investigation of incumbent LEC wholesale DSL rates has been conducted, and the rates are not subject to TELRIC pricing as a UNE. Indeed, some incumbent LECs have raised wholesale DSL rates while reporting declines in the costs of providing service.[33]

Nothing about the nature of wholesale DSL service has changed to warrant a Commission reversal of its previous holdings that DSL sold to ISPs in bulk is a "telecommunications service." The essential characteristics of the service, including the fact that it has been offered indiscriminately to all users, have remained the same since the 1998 *GTE DSL Order*. Any regulatory reclassification from common carrier to private carrier status,

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[31] Id., ¶ 265.

[32] *In the Matter of NorLight,* Declaratory Ruling, 2 FCC Rcd. 132, ¶ 21 (1987) (private carriage found where (i) provider would "negotiate with and select customers on an individualized basis," (ii) "there would be no set prices or terms of service" and service would be "tailored to the specific operational requirements of each user," (iii) contracts would be long-term of "five or ten years long" with "limited and stable" customer base, and (iv) provider's "primary objective is to meet the internal needs of the parent" owners).

[33] *See,e.g.,* BellSouth 1st Quarter Report 2001 at http://bellsouth.com/annualreport/1q01report/quarterlynews.htm (noting that customer self-installation of DSL has decreased operating expenses); *see also,* EarthLink Petition to Reject or, in the Alternative, to Suspend and Investigate, *In the Matter of BellSouth's Tariff FCC No. 1, Transmittal No. 590, ADSL Service Revisions* (May 21, 2001) at 7 (noting rate increase in tariff revision and decreasing costs).

therefore, would conflict with the statutory meaning of "telecommunications service," as confirmed by the Commission's precedent and the *NARUC I* common carrier test.

4. Incumbent LECs Engage in Far More Than Simple "Self-Provisioning" of DSL -- According to incumbent LECs, they offer the same wholesale DSL services, as well as ATM and Frame Relay services, to their Internet access affiliates that they offer to unaffiliated ISPs.[34] Thus, all of the ISPs competing in the same market have available to them the telecommunications service they use as a telecommunications input for their information services, allowing all ISPs to compete and to differentiate their services based on enhanced features demanded by consumers.

The fact that an affiliated ISP takes the DSL service and then uses it as an input for an information service does not change its statutory classification as a wholesale DSL offering. As noted above, the Commission's 1998 *Advanced Services MO&O* (¶ 37) and the 2001 *CPE/Enhanced Services Unbundling Order* (¶ 46) explained that such DSL services are "telecommunications services" while expressly recognizing that those services would also be used by affiliated ISPs as an input to offer Internet access. As those orders recognize, whether a telecommunications input is "self-provisioned" does not impact the question of whether the carrier is offering the transmission as "telecommunications" (such as on a private carrier basis) or as a "telecommunications service." Moreover, as the Commission has recognized, wholesale

[34] *See,* Comments of Qwest Corporation, CC Dkt. Nos. 95-20,98-10, at ii (April 16, 2001) ("The services which Qwest offers to enhanced service providers . . . are used by Qwest's own enhanced service operations in accordance with Qwest's filed comparably efficient interconnection plans"); Comments of BellSouth Corporation, CC Dkt. Nos. 95-20, 98-10, at 3 (April 16, 2001) ("All capabilities used by BellSouth's own enhanced service operations are available to independent ISPs on a non-discriminatory basis. Specifically, BellSouth's DSL services are available on a non-discriminatory basis to all ISPs pursuant to tariff.").

DSL may also be purchased to provide transmission for a corporate LAN or other uses.[35] In short, it is irrelevant what use the purchaser (either an ISP or a corporation) may make of the transmission service.[36] Under *NARUC I*, the statutory "common carrier" service test looks to the nature of the service offering, and not to the purchaser's intent or application of the service.

Thus, while the NPRM (¶ 25) asserts that the "provision of wireline broadband Internet access service over a provider's own facilities is an information service" that includes "telecommunications" but not "telecommunications service," this analysis applies only to the service the ISP or the incumbent LEC offers *the end-user*. It says nothing about the proper regulatory classification of the wholesale DSL services that the incumbent LEC offers to affiliated and unaffiliated ISPs. The Commission has stated on many occasions, as described above, that these wholesale DSL services are "telecommunications services." Further, the issue of incumbent LEC transmission services functioning as an "input" is not unique to broadband -- incumbent LECs provide their narrowband services for use in a host of narrowband ISP contexts (e.g., dial-up Internet access). While the incumbent LEC may also "self-provision" such services to provide an information service to end-users, such as dial-up Internet access, this does not alter the fact that such services are "telecommunications services" offered under exchange and exchange access tariffs.

The issue of ISP "self-provisioning" arose and received considerable attention in the *USF Report to Congress*.[37] The *USF Report to* Congress, however, addressed only the issue of

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[35] *GTE DSL Order*, ¶ 27.
[36] Virgin Islands Telephone Co., 339 F.3d at 928 (*NARUC I* test applies regardless of whether carrier sells on a wholesale basis).
[37] *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶¶ 69-72 (1998) ("*USF Report to Congress*").

whether an ISP that engages in certain "self-provisioning," but does not offer the service *to the public*, should be assessed a USF payment obligation for the provision of that telecommunications. Thus, the ISP "self-provisioning" considered therein is entirely distinct from the incumbent LEC's DSL services, because the incumbent LECs offer telecommunications services to the public. Indeed, not only do the incumbent LECs offer DSL to ISPs and to other members of the public but, consistent with applicable FCC law, affiliated ISPs also takes from the same tariffed service that is offered to unaffiliated ISPs.[38] Thus, incumbent LECs do not engage in the incidental ISP "self provisioning" considered in the *USF Report to Congress*. Incumbent LECs may not simply assert "self-provisioning" as a regulatory shortcut by which to evade established common carrier obligations. As the Commission noted in the *USF Report to Congress*, "[i]t is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail."[39] It is equally plain that the same incumbent LEC may not escape Title II regulation of DSL service simply because it or its affiliated ISP packages that service with Internet access.

B. Wholesale DSL Service Providers Are and Must Remain Common Carriers

1. The Public Interest Demands Common Carriage -- The NPRM (¶ 26) asks whether wholesale DSL should be treated as "telecommunications" or "telecommunications service." As noted above in Section I(A), the Commission has repeatedly answered that wholesale DSL is, indeed, a "telecommunications service."

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[38] *Computer III*, 104 F.C.C. 2d. at 1040 (¶ 159) ("We require the carrier's enhanced service operations to take the basic services used in its enhanced service offerings at their unbundled tariffed rates").
[39] *USF Report to Congress*, ¶ 60.

Further, while the NPRM (¶ 26) seeks comment on "whether and how the Commission might regulate incumbent LEC provision of broadband to third parties as private carriage," EarthLink respectfully submits that the Commission may not alter the regulatory classification of wholesale DSL in that manner. In *NARUC I*, the D.C. Circuit rejected the notion that the Commission has unfettered discretion to confer or not confer common carrier status, depending on the regulatory goals it seeks to achieve. "The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[40] In this case, and as described above, the nature of the service compels the finding that incumbent LECs are offering wholesale DSL as common carriers, and not as private carriers. The Commission's orders, discussed above, affirm that statutory classification of the service.

Not only are incumbent LEC services offered on a common carrier basis but, under *NARUC I*, "the public interest requires common carrier operation" of such services.[41] One factor of the Commission's inquiry in this part of the *NARUC I* test is whether the provider "has sufficient market power to warrant regulatory treatment as a common carrier,"[42] which can be measured by the existence or lack thereof of "sufficient alternative facilities."[43] As the Commission has explained:

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[40] NARUC v. FCC, 525 F.2d 630, 644 (D.C. Cir. 1976) (*NARUC I*), *cert. denied*, 425 U.S. 992.
[41] Virgin Islands Tel. Corp. v. FCC, 198 F.3d at 924 (citing *Cable & Wireless, PLC*, Cable Landing License, 12 FCC Rcd 8516, ¶¶ 14-15 (1997)).
[42] *See* Virgin Islands Tel. Corp., 198 F.3d at 925. *See also Philippine Long Distance Tel. Co.*, 12 FCC Rcd at 15007-08 n. 45.
[43] *See* Virgin Islands Tel. Corp., 198 F.3d at 925.

> [T]he presence of significant competition is an important factor in determining whether common carrier requirements should be imposed on satellite operators... [because] if the barriers to entry for new satellite operators are low and alternative competitive sources of satellite services are available to consumers, satellite operators will have an incentive to offer service efficiently at low rates. In such an environment, the Commission has held that it is not necessary to compel space station operators to offer their service indifferently to the public as a common carrier because competition will achieve the same result for purchasers of space segment capacity as regulation, that is, efficient service at low prices.[44]

In addition, the Commission has held that common carrier regulation is necessary to prevent unjust and unreasonable discrimination.[45]

In this case, incumbent LECs have a continuing obligation to offer wholesale DSL on a common carrier basis, because they are the dominant providers and there is no "significant competition" or "alternative competitive sources" upon which ISPs can rely for wholesale broadband transport.[46] As the record in the *ILEC Broadband Dominant/Non-Dominant* proceeding (CC Dkt. No. 01-337) indicates, the incumbent LECs are the dominant provider of wholesale transport to the market.[47] The Commission's most recent study shows that incumbent LECs provide 93% of DSL services.[48] Incumbent LECs also hold essential facilities in the provision of that service including: central office facilities; control over the loop connecting the

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[44] *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Notice of Proposed Rulemaking, 14 FCC Rcd at 4843, 4876, ¶ 75 (*"MSS NPRM"*) (citing *Domestic Fixed Satellite Transponder Sales*, 90 F.C.C. 2d 1238, 1254-55 (1982), *aff'd*, Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984), *modified, Martin Marietta Communications Systems*, Memorandum Opinion and Order, 60 R.R. 2d 779 (1986)). *See also Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, 15 FCC Rcd 16127, ¶ 94 (2000) (*MSS Order*).

[45] *Hughes Communications, Inc.*, Order and Authorization, 12 FCC Rcd 7534, 7541, ¶ 20 (1997).

[46] Id.

[47] *See*, Reply Comments of EarthLink, Inc., CC Dkt. No. 01-337 (filed April 22, 2002) (attached hereto) ("*EarthLink Non-Dom Reply*").

[48] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Third Report, 17 FCC Rcd. 2844, ¶ 51 (2002) ("*Third Report*").

customer to the incumbent LEC's DSLAM; control over the operations support systems and installation processes used by ISPs to connect their customers to the DSL; and control over the backhaul ATM and Frame Relay services transporting the data communications from the incumbent LEC central office to the ISPs. Further, as the record in this *Computer III* proceeding (CC Docket 98-10, 95-20) already makes plain, incumbent LECs have the ability and opportunity to engage in anticompetitive action vis-à-vis unaffiliated ISPs.[49] Finally, the vitality of competition between incumbent LEC DSL and cable modem services, even where it does exist, is highly questionable since several factors limit consumers' ability to switch between one platform and another.[50]

EarthLink agrees with the NPRM (¶ 29) that Section 706 of the 1996 Act also informs the question of the public interest obligations in this case. Rather than deregulation, however, as found in the *Advanced Services Second R&O*, the Commission furthers Section 706 goals when incumbent LECs offer DSL to ISPs "at the lowest possible price" so that "*consumers ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services*."[51] This public interest determination would be expressly and directly undermined because eliminating common carrier access requirements would undoubtedly harm price competition and innovation and their attendant consumer benefits.

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[49] *See, e.g.,* Comments of Commercial Internet exchange Association, CC Dkt. Nos. 95-20, 98-10, at 7-9 (April 16, 2001); Comments of ITAA, CC Dkt. Nos. 95-20, 98-10, at 6-12 (April 16, 2001).
[50] *See, EarthLink Non-Dom Reply* at 8-10.
[51] *Advanced Services Second R&O*, ¶ 20 (emphasis added).

Private contract arrangements between incumbent LECs and unaffiliated ISPs, if they occur at all, would significantly undermine the public interest in deployment of broadband and in the diversity of information and applications available to the American public. Operating only on a private carriage basis, the incumbent LECs would hold all negotiating leverage with regard to unaffiliated ISPs, and would have no obligation to offer wholesale DSL to ISPs at all. As the NPRM (¶ 52) suggests, the incumbent ILECs would assuredly restrict availability of DSL to affiliated ISPs in order to increase their market share in the retail high-speed Internet access market and to stem the possible threat of new applications to the incumbent LECs' core business revenues. Private carriage, therefore, works to the best advantage of the incumbents, but it does so at the expense of the public interest in an open platform that allows consumers to choose among a diversity of providers of broadband-based services and unrestricted applications. Accordingly, under *NARUC I*, the incumbent LECs must be treated as common carriers in the wholesale provision of DSL services.[52]

Moreover, it is beyond question that today's regulatory environment provides incumbent LECs with sufficient incentives to deploy DSL; the deregulation proposed in the *NPRM* would result in no additional deployment for the substantial benefit of the public. The available evidence shows that incumbent LEC ADSL services under existing dominant carrier regulation have been a remarkable success for the incumbents. The Commission's *Third Report* and the U.S. Commerce Department's *A Nation OnLine* both convincingly demonstrated that broadband deployment, including that of incumbent LECs, under the current regulatory regime continues to move forward rapidly. The Commission has found that incumbent LECs provide 93% of the ADSL in the market, while the "deregulated" DLECs have only a 7% share, and that

[52] *NARUC I*, 525 F.2d at 642.

"[i]ncumbent LECs added customers at a much faster rate than competitive LECs between the third quarter of 2000 and the third quarter of 2001."[53] Comparing incumbent LEC ADSL residential and business line growth rates with those of cable, the FCC's data also shows that the incumbent LECs' growth significantly exceeds that of cable.[54] Similarly, the Commerce Department's *A Nation OnLine* shows that the rate of subscription of broadband services has been more accelerated than that of other technology adoption rates in recent history, including cellular technology, cable television, paging, and color television.[55]

Thus, there would appear to be no public interest benefit to be gained in the form of increased deployment by switching course on regulation of incumbent LEC wholesale broadband transport services, and gambling that incumbent LECs will not use monopoly power either to contract supply of broadband transmission, increase prices on consumers, or harm the high level of competition in the ISP market. Instead, incumbent LECs' complaints are with TELRIC pricing and certain UNE unbundling matters, which are independent of the ISP access regulations under consideration in this proceeding.

Finally, EarthLink notes that there is no need for a "new" or hybrid classification of wholesale DSL. NPRM ¶ 27. The Commission's current regulatory classification scheme is not at odds with the Communications Act, nor has it produced unworkable results. Further, the Commission has soundly rejected such proposals for a "hybrid" classification in the past.[56]

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[53] *Third Report,* ¶ 51.
[54] *Third Report,* Appendix C, Tables 3 and 4 (growth from Dec. 2000 to June 2001 for residential and business advanced services (over 200 kbps in one direction) was 56% for ADSL and 52% for cable, and growth for other advanced services (over 200 kbps in both directions) was 133% for ADSL and 45% for cable).
[55] *A Nation OnLine,* at 37, Figure 4-3 "Rate of Deployment of Selected Technologies."
[56] *USF Report to Congress,* ¶¶ 56-60.

2. A Shift to Private Carriage Could Deny Service to Hundreds of Thousands of American Consumers -- Among the greatest public interest factors to be taken into consideration, the DSL service currently serving perhaps hundreds of thousands of Americans hangs in the balance as the Commission considers whether to permit the incumbent LECs to reclassify their DSL services as private carriage.[57] Today, EarthLink supplies many thousands of Americans with high-speed Internet access service via incumbent LEC DSL, but a "privatization" of that common carrier service may well mean a disruption of service to those Americans. Without a specific contractual arrangement in place between the incumbent LEC and the many ISPs currently offering high-speed Internet access service via incumbent LEC DSL, the carrier could and likely would unilaterally discontinue its transmission service upon the Commission's "private carriage" finding. Rather than a mere theoretical question of prospective rulemaking choices, the issue of common carriage status would have an immediate impact on thousands of Americans who rely today on DSL provided to ISPs.

While EarthLink is confident that the Commission does not intend to encourage such discontinuance of service in abrogation of Section 214 of the Act, the elimination of common carrier DSL services would threaten the end of service to hundreds of thousands of EarthLink's end-users. Such discontinuance of service would necessarily entail a significant public interest determination under Section 214 of the Act, which requires that "[n]o carrier shall discontinue, reduce or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor the future

[57] *See e.g.*, National Ass'n. of Independent Television Producers and Distributors v. FCC, 502 F.2d 249, 254 (2d Cir. 1974) (FCC must consider reasonable reliance of parties upon FCC regulations).

public convenience and necessity will be adversely affected thereby."[58] In this case, however, a shift from common carriage to private carriage would provide incumbent LECs with ample ability and incentive to discontinue service to unaffiliated ISPs or to modify such service to the incumbent LEC's advantage with seemingly no regulatory safeguards at all. This would be contrary to the plain statutory language of Section 214, because American consumers would be dramatically and negatively affected by such a discontinuance of telecommunications service, including losing the ability to access ISPs and current Internet services (including access to email, news services, etc.). The consequences of such dislocation became glaringly obvious as a result of the @Home bankruptcy, which left thousands of American consumers without a viable alternative provider, with no email, and without even a transition path to another ISP. As Chairman Powell noted to the @Home bankruptcy court, the Commission "has a strong interest in the provision of high-speed Internet services to the American public" (citing Section 706 of the 1996 Telecommunications Act),[59] and, presumably, it has just as strong an interest in avoiding a repeat of that consumer disaster with incumbent LEC DSL services.

Remarkably, however, the NPRM does not consider the practical implications of reclassifying an existing and widely deployed telecommunications service such as wholesale DSL by suddenly declaring it to be "private carriage." The dislocation caused by potential discontinuance of service is, in itself, ample grounds to conclude that such a regulatory reclassification is contrary to the public interest.

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[58] 47 U.S.C. § 214(a).

[59] Letter of FCC Chairman Powell to U.S. Bankruptcy Judge Thomas Carlson, In re At Home Corp. et al., at 1 (dated Nov. 29, 2001).

C. Consumer Choice of ISPs will Maximize the Benefits of Broadband

As explained above, deregulation of the DSL service ISPs use to offer wireline broadband Internet access service may enable DSL carriers to refuse to provide wholesale DSL service to unaffiliated ISPs. Such a development would put independent ISPs at a severe disadvantage in competing with affiliated ISPs, particularly as consumers transition from narrowband to broadband wireline Internet access services. The resulting decrease in the number of independent ISPs would be a tremendous blow to consumers.

ISPs provide consumers far more than simple, mechanical access to the Internet. Because of the multitudes of ISPs competing in the marketplace, they have diversified and innovated, providing new and exciting options for people who want to get on the Internet. They offer different content, different functionalities, different pricing packages, and different privacy policies. These variations are a direct result of the rich, vibrant competition that currently thrives among ISPs, and they have been an enormous boon to consumers. The Commission should be working to preserve the consumer benefits such competition has provided, not eliminate them.

Today there are thousands of ISPs, large and small, regional and national, each of which provides consumers a particular combination of benefits.[60] No single ISP, even a very large one affiliated with an ILEC, can provide this breadth of consumer benefits. For example, some ISPs

[60] ISP World, Find an ISP, <http://www.ispworld.com/public/ispsearch/searchStart.jsp>.

focus on small-business consumers,[61] others serve larger businesses,[62] and still others serve rural communities and their particular needs.[63]

These substantive distinctions run much deeper than a decision by an ISP to carry certain content and market to particular communities. An Internet access customer may feel more comfortable entrusting personally identifiable information to an ISP run by people he or she knows or shares a particular viewpoint with, rather than an ISP controlled by the customer's telephone company. Thus, an ISP's failure to appeal to particular segments of the market is not always a matter of choice for the ISP -- the ISP, simply because of its corporate identity, may be incapable of attracting certain customers. As Internet access customers transition to broadband, an FCC decision to deregulate DSL would greatly reduce this choice of ISPs, essentially forcing customers to turn to ISPs controlled by carriers, whether they want to or not.

There are also concerns unrelated to content and privacy that drive ISP competition and provide consumer benefits. ISPs offer greater and lesser degrees of e-mail functionality, complexity of features (*e.g.*, audio or video features), technical flexibility, and pricing plans (including pre-paid access[64]). For example, one ISP may offer an Internet access customer extensive storage space for email messages, while another provides customers their own web pages, and yet another supplies instant messaging capability. ISPs use these varying options to compete for customers, and the ISP that wins the customer is the one that offers the mix of

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[61] *See e.g.*, <http://www.aaccessusa.com>.
[62] *See e.g.*, <http://www.cwservice.com/services/expertise/medium-large.html>; <http://www.business.att.com/>.
[63] *See e.g.*, <http://www.etv.net/www/internet_service.html>; <http://rivervalley.centurytel.net/service/>.
[64] *See, e.g.*, "Prepaid cards offer new route to Net," by Jon Van, *Chicago Times* (Dec. 24, 2001) *found at* <http://messenger-inquirer.com/features/technology/3925989.htm>.

features and terms that best match that customer's needs. In fact, in order to meet those needs and succeed in a competitive market, ISPs have developed and distributed to consumers technologies such as instant messaging that may never have been created had competition not driven them.

The mere fact that thousands of ISPs exist in the market today proves beyond dispute that American consumers demand a variety of services, and no one provider can serve all. Consumers are keenly aware that they have a choice. If consumers become dissatisfied with service quality, content, privacy practice or any other aspect of an ISP's Internet access, they can and do switch providers, which helps keep all ISPs quality-conscious and stimulates innovation.[65] No single ISP -- including ILEC-affiliated ISPs -- can meet all of those needs.[66] It is not appropriate for the FCC unilaterally to deprive the market of the diverse supply of ISPs it so clearly demands.

An often-heard lament is that consumers are taking too long to transition to broadband, and a common explanation is that the broadband applications and services that will attract consumers do not yet exist.[67] Significantly, the state of open competition between ISPs drove the development and variety of narrowband Internet applications that exist in the marketplace

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[65] Lisa Pierce, "What the cost of customer churn means to you," *Network Fusion* (Nov. 11, 2001) *found at* <http://www.nwfusion.com/columnists/2001/1112eye.html> ("ISP [dial-up] churn rates average 4% to 8% per month (48 to 96% per year). EarthLink's current churn rate is on the low end of that scale at almost 47% per year. ... [C]hoice of ISP over broadband access is fairly constrained right now. The amount of churn over broadband is artificially depressed and will rise as broadband access providers open the door to ISP choice.").

[66] Indeed, incumbent LEC-affiliated ISPs were relatively late in their focus on the Internet access business, aggressively pursuing it only in recent years. SBC Press Room, "SBC Completes Tender Offer For Prodigy Stock" (Nov. 2, 2001), *found at,* www.sbc.com/press_room/1,5932,31.oohtml?query=20011102-01.

[67] *See, e.g.,* "Does Fast Internet Need a Push?" by Jonathan Krim, *Washington Post* (Jan. 15, 2002), p. A1.

today,[68] where almost all Americans have local access to four or more ISPs.[69] As it did in narrowband, competition among ISPs will help drive the development of these new broadband consumer benefits. As long as ISPs have the ability to obtain broadband transmission service as an input to provide innovative services, they will strive to find and market those services. As the record in the *Incumbent LEC Broadband Dominant/Non-Dominant Proceeding* (CC Docket 01-337) indicates, independent ISPs have actual, plentiful access to only one broadband transmission technology: DSL. EarthLink and some ISPs have managed to obtain access to broadband transmission over cable, but they are few in number and the FCC has recently announced its intention that it will not help make broadband cable transmission available to more ISPs. That leaves DSL, a broadband transmission service that is widely available to independent ISPs only because the FCC has treated it as a common carrier service. Thus, ISP competition -- the kind that has led to such enormous innovation and consumer benefit in narrowband -- simply does not exist except among ISPs that can obtain DSL transmission services. Allowing carriers to withdraw their DSL offerings by avoiding either Title II, *Computer II* or *Computer III* obligations would be the death knell for broadband competition in this country. Further, if incumbent ILECs offer information services via "next generation" networks, the same principles, including *Computer II*, should apply.

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[68] "A Vision for 21st Century Wired and Wireless Broadband: Building the Foundation of the Networked World," Computer Systems Policy Project, at 5 (showing explosive growth of narrowband Internet access usage in the U.S., from under 20 million users in 1995 to over 160 million users in 2000), *found at* http://www.cspp.org/reports/networkedworld.pdf.
[69] J. Oxman, "The FCC and the Unregulation of the Internet," FCC OPP Working Paper Series, at 17 (July 1999).