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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-In-Billing and Billing Format	)	CC Docket No. 98-170

REPLY COMMENTS OF EARTHLINK, INC.

EarthLink, Inc., by its counsel, hereby files this Reply in the above-captioned proceeding to reform the current universal service fund ("USF") collection mechanism and carrier USF pass-through practices.[1] EarthLink is the nation's largest independent Internet Service Provider (ISP) with over 532,000 broadband Internet access subscribers

[1] *See In the Matter of Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, CC Docket No. 96-45, et al., FCC 02-43 (rel. Feb. 26, 2002) ("FNPRM").

among its approximately 4.9 million total subscribers. EarthLink files this short reply to emphasize two points in this proceeding. *First*, Section 254 of the Act and the federal policy for an unregulated Internet do not permit assessment of direct USF regulation and charges on ISPs. *Second*, for carriers that choose to pass-through USF charges, these pass-through practices must be reasonable and nondiscriminatory for all ISPs.

EarthLink disagrees with the *ad hoc* suggestion of BellSouth and SBC that "it is more appropriate to treat ISPs like IXCs, rather than end users, for universal service purposes."[2] Section 254(d) of the Act sets forth only two classes of universal service contributors: (1) "every telecommunications carrier that provides interstate telecommunications services," i.e., mandatory contributors; and (2) "any other provider of interstate telecommunications...if the public interest so requires," i.e., permissive contributors. 47 U.S.C. § 254(d). As a statutory matter, and as the Commission has explained, ISPs fit neither of the two USF contributor categories.[3] Further, ISPs such as EarthLink that lease telecommunications facilities cannot be said to provide telecommunications.

Moreover, it is inappropriate to weigh down this proceeding with the SBC/BellSouth proposal, which was not requested by the FNPRM. The Commission has already considered and rejected attempts by the incumbent LECs to analogize and treat ISPs as if they are interexchange carriers, and the judiciary has affirmed the FCC's

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[2] Comments of SBC at 8 *and* App. A, "Universal Service Allocation Mechanism" at 1; Comments of BellSouth at 4.

[3] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 788 (1997) (ISPs "are not required to contribute to support mechanisms to the extent they provide such services"); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶ 32 ("The Act imposes no regulatory obligations on information service providers as such"), ¶ 144 (FCC excluded ISPs from USF "contribution requirements based on the plain language of section 254(d).")(1998).

decisions on this matter.[4] Further, the Commission's longstanding precedent of treating non-facilities-based ISPs as users of telecommunications, not providers of telecommunications, is a vital policy ensuring that carrier regulation does not stifle ISP market entry and competition. The incumbent LEC efforts for USF regulation to apply to ISPs, at the same time as they strenuously argue for elimination of their last-mile common carrier broadband obligations, are at odds and should not be further entertained.

Further, ISPs purchasing telecommunications service make substantial indirect payments into the USF system through USF pass-throughs imposed on ISPs by carriers. The Commission needs to clarify that carrier pass-through practices must be just, reasonable and non-discriminatory in all cases. The Commission should clarify, for example, that incumbent LECs charging a USF pass-through on DSL sold to unaffiliated ISPs but not on DSL for affiliated ISPs would amount to rate discrimination in violation of both Section 202(a) of the Act and Commission precedent.[5] Instead, if incumbent

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[4] *In the Matter of Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, ¶ 344 (1997) ("it is not clear that ISPs use the public switched network in a manner analogous to IXCs"), *aff'd*, Southwestern Bell Tel.Co. v. FCC, 153 F.3d 523, 542 (8th Cir. 1998) ("the Commission's actions do not discriminate in favor of ISPs, which do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges").

[5] 47 U.S.C. Sec. 202(a); *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 851 (1997) (if carriers choose to pass-through USF contribution, it shall do so "to all of their customers of interstate services in an equitable and nondiscriminatory fashion."); id., ¶ 829 (if carriers decide to pass-through USF costs, "the carriers may not shift more than an equitable share of their contributions to any customer or group of customers").

LECs decide to pass through USF charges, then affiliated ISPs should be treated no better than an unaffiliated ISP for USF pass-through purposes.

Respectfully Submitted,

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Certificate of Service

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