Sher Blackwell
ATTORNEYS AT LAW
Suite 900 · 1850 M Street, N.W. · Washington, D.C. 20036
Telephone: 202.463.2500 · Facsimile: 202.463.4950 · www.sherblackwell.com
A LIMITED LIABILITY PARTNERSHIP

DOCKET FILE COPY ORIGINAL

WRITER'S DIRECT DIAL
(202) 463-2510

RECEIVED

JUN 17 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 17, 2002

VIA MESSENGER

Marlene H. Dortch, Secretary
Federal Communications Commission
Room TW-B204
445 12th St., S.W.
Washington, D.C. 20554

RE: EarthLink, Inc. Comments in CS Docket No. 02-52; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities

Dear Ms. Dortch:

Enclosed are one original and four copies of the Comments of EarthLink, Inc. in the above-referenced matter. Also enclosed are five additional copies for distribution to each of the Commissioners.

Please contact the undersigned if you have any questions regarding this filing. Thank you for your kind assistance.

Sincerely,

John W. Butler
Counsel for EarthLink, Inc.

cc: Qualex International (2)
Sarah Whitesell, Media Bureau (2)
Linda Senecal, Media Bureau (5)

No. of Copies rec'd 0+9
List ABCDE

RECEIVED
JUN 17 2002
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	CS Docket No. 02-52
Appropriate Regulatory Treatment for	)	
Broadband Access to the Internet Over	)	
Cable Facilities	)	

COMMENTS OF EARTHLINK, INC.

John W. Butler
Earl W. Comstock
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036

Dave Baker
Vice President for Law
and Public Policy
EarthLink, Inc.
1375 Peachtree Street
Atlanta, GA 30309

June 17, 2002

TABLE OF CONTENTS

Page

1. Background and Introduction 2

2. The Commission Must Adopt An Open Access Requirement If Broadband Internet Access Is To Reach Its Full Potential 3

   a. Cable Operators Are The Major Broadband Platform Both Nationwide and In The Individual and Separate Markets That They Serve 5

   b. Voluntary Actions Are Inadequate; Multiple ISP Access Must Be Required 7

3. The Multiple ISP Access Requirement Should Mirror the *Computer II* Requirements 9

4. The Commission Has The Statutory Authority To Adopt A Multiple ISP Access Requirement 11

5. The Commission May Not Forbear From Title II Regulation Of The Transmission Portion of Cable Modem Services 15

6. Conclusion 19

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	**CS Docket No. 02-52**
Appropriate Regulatory Treatment for	)	
Broadband Access to the Internet Over	)	
Cable Facilities	)	

COMMENTS OF EARTHLINK, INC.

EarthLink, Inc. ("EarthLink") respectfully submits these comments in response to the Notice of Proposed Rulemaking (the "NPRM") released in the above-referenced docket on March 15, 2002.[1] EarthLink is the nation's third largest Internet service provider ("ISP"), and serves customers using all available transmission platforms: dial-up telephone lines, digital subscriber lines, cable transmission facilities, satellites, and wireless transmission services. The issue that the Commission continues to wrestle with – whether the Commission will exercise its authority to ensure consumer choice and vigorous competition in the market for broadband Internet services – is therefore of critical importance to EarthLink and its customers.

As EarthLink explains in more detail below, it is imperative that the Commission act now to adopt a requirement that cable companies which provide Internet access service to the public for a fee over their own

[1] The March 15, 2002, document consists of three separate sections: a Declaratory Order, a Notice of Proposed Rulemaking, and an Introduction and Background that applies to both of the first two. For the purposes of these comments, EarthLink will cite to the document as the "NPRM," regardless of the location of the cited paragraph within the document.

transmission facilities must sell the underlying transmission service to unaffiliated ISPs on nondiscriminatory terms and conditions.

1. Background and Introduction.

The current proceeding, of course, is not the first time the Commission has sought comment on the question of whether cable companies that use their own transmission facilities to provide Internet access services to the public for a fee should be required to provide transmission to unaffiliated ISPs on non-discriminatory terms and conditions. As the Commission notes in the introduction to the NPRM, the issue dates back at least to 1998.

As is often the case when proceedings drag on for an inordinate length of time, the record here has become complicated -- or at least confused. In this proceeding, for example, the Commission's deliberations have been overtaken by the courts with respect to the fundamental statutory classification issue addressed by the Declaratory Order. By the time the Commission declared on March 15, 2002, that cable modem service does not include a telecommunications service,[2] the decision of the Ninth Circuit Court of Appeals adopting precisely the opposite result had been in place for over a year and a half. *AT&T Corp. v. City of Portland*, 216 F.2d 871, 878 (9th Cir. 2000). Numerous consolidated petitions for review of the Commission's Declaratory Order in GN Docket 00-185 are pending before the Ninth Circuit, one of which was filed by EarthLink.[3]

---

[2] NPRM at ¶ 39.

[3] *Brand X Internet Services, Inc. v. FCC*, Case No. 02-71425, and consolidated cases.

The statutory classification issue on appeal, of course, is not at issue in the NPRM. That said, the Declaratory Order forms the legal framework for the questions raised in the NPRM, as well as the legal predicate for any actions that the Commission may take in this proceeding. EarthLink therefore reiterates its belief that the Commission's Declaratory Order is unlawful. Consistent with that position, EarthLink believes that the premise of the NPRM – that any multiple ISP requirement would have to be based on the Commission's ancillary jurisdiction, is incorrect. Rather, the common carrier obligations of the Communications Act itself require that cable operators which use their own facilities to provide Internet access to the public for a fee must provide the transmission underlying that Internet access service to unaffiliated ISPs and others on non-discriminatory terms and conditions. Accordingly, EarthLink's comments in support of the adoption of an open access requirement pursuant to the Commission's ancillary jurisdiction are in the alternative to, and without prejudice to, EarthLink's position that such a requirement already exists under Title II of the Act.

2. The Commission Must Adopt An Open Access Requirement If Broadband Internet Access Is To Reach Its Full Potential.

The Commission states the central issue in the NPRM as "whether it is necessary or appropriate at this time to require that cable operators provide ISPs with the right to access cable modem customers directly (what we refer to hereafter as 'multiple ISP access')."[4] The answer is an emphatic "Yes." Multiple ISP access is absolutely essential if the success of the dial-up Internet is to be matched and ultimately surpassed by the broadband Internet. Multiple ISP

[4] NPRM at ¶ 72.

access will introduce both consumer choice and service and price competition into the market for broadband Internet access services. Both choice and competition are currently non-existent with respect to large portions of that market. Moreover, because it is only the transmission component of the service that would be affected by the multiple access requirement, adopting such a requirement would leave unregulated the Internet access "information service" portion of cable modem service, a goal often stated by the Commission, and one with which EarthLink wholeheartedly agrees.

Many of the reasons why a multiple ISP access requirement is necessary are set forth in the NPRM. These reasons include the fact that cable system operators are the major providers of broadband Internet services today, and that they are leveraging this position to increase prices. Moreover, there is evidence that facilities-based DSL providers and cable companies have chosen not to compete in any meaningful way.[5] In addition, all indications are that long-promised voluntary access by cable system operators to unaffiliated ISPs are not being meaningfully implemented and will not provide choice or competition for the majority of subscribers and potential subscribers in the foreseeable future. These indicators, which all point to results that are diametrically opposed to the Commission's and EarthLink's vision of a vibrant and competitive broadband Internet, are discussed in more detail below.

[5] NPRM at ¶ 9.

a. Cable Operators Are The Major Broadband Platform Both Nationwide and In The Individual and Separate Markets That They Serve.

The facts cited by the NPRM regarding cable's leading position in the broadband Internet access market are, by themselves, more than ample reason to adopt a multiple ISP access requirement. As the Commission points out, cable accounts for approximately 68 percent of the broadband Internet access market.[6] Market share in excess of two thirds is cause for alarm by itself, but that figure becomes even more disturbing when one recognizes that, in many markets, the share is actually close to or at 100 percent. The numbers cited by the Commission are national aggregates. For the purposes of competition analysis, the only market that is relevant is the market in which consumers reasonably have access to substitutes, i.e., local markets. When viewed through this more proper lens, cable's power becomes even more clear. DSL is the only real alternative broadband platform to cable now and for the foreseeable future for most people. But DSL is geographically limited because of the constraints of the underlying technology. Thus, in the many places where DSL is not available, cable is the only available broadband platform, and in most places there is only one cable company.[7] Because cable companies generally offer Internet access only over their own networks or through wholly owned affiliates, a substantial number of subscribers and would-be subscribers have no meaningful choice of broadband Internet access service providers. For

---

[6] *Id.*

[7] Satellite-based broadband Internet access is technically available to many homes and businesses, but due to numerous factors including high customer premises equipment (CPE) costs, professional installation requirements, and high monthly service costs, satellite is far less a direct competitor to cable and DSL than it is a platform of last resort for those consumers who have no other broadband platforms available to them.

this substantial portion of the population, the high-speed Internet access market is a monopoly.

That there is substantial market concentration cannot be seriously contested. That such concentration is producing the entirely predictable results of increased prices consistent with a monopoly market is similarly clear. As the Commission points out in the NPRM, it appears that incumbent local exchange carrier ("ILEC") DSL providers and cable companies have decided, at least for now, not to compete head-to-head, but rather to maximize their profits within their natural regional monopolies:

> In the past year, some incumbent LECs have scaled back their DSL deployment plans; cable's lead over DSL has grown; and several incumbent LECs and cable operators have raised their prices for high-speed Internet access services.[8]

Against this backdrop of market concentration and the completely predictable price hikes caused by that concentration, the only rational response is to attempt to introduce competition into the high-speed broadband Internet access market. There are two ways to do that. First, one can hope that there will be a massive and immediate flurry of cable overbuilding with penetration levels sufficient to break the market power of incumbent cable companies. Given the ongoing consolidation that has occurred in the cable industry over the past several years, and given the absence of any indication that the capital markets would even consider financing such an effort, that option must be discarded as unworkable.

---

[8] NPRM at ¶ 9 (footnote omitted).

The other option is to adopt here the tried and true multiple ISP access requirement established in the *Computer II Final Order*,[9] a rule that the Commission has successfully administered for over 20 years. There are a number of ISPs, such as EarthLink, that are prepared to immediately provide price and service competition to customers who today do not have it. EarthLink is prepared to do so nationwide, while others may offer regional or local competition. Either way, consumers benefit, and cable companies obtain higher take rates and therefore increase their revenues. The only reason not to provide these immediate benefits to American consumers would be to protect the monopoly position of the cable companies, a policy objective not found in the Communications Act.

b. Voluntary Actions Are Inadequate; Multiple ISP Access Must Be Required.

The NPRM specifically seeks comment as to whether voluntary arrangements will lead to significant availability of ISP choice:

> We seek comment in particular on whether the commercial relationships and trials discussed above demonstrate that the market will provide consumers a choice of ISPs without government intervention, or whether the absence of widespread business arrangements raises a level of concern sufficient to warrant Commission action.[10]

The underlined portion of the quoted language from the NPRM hits the nail on the head. Although there are examples of commercially negotiated multiple access arrangements, they are the exception, not the rule. EarthLink has been more successful than most at obtaining access to cable system

---

[9] *In the Matter of Amendment of Section 64.701 of the Commission's Rules and Regulations*, Final Order, 77 F.C.C.2d 384 (1980) (hereinafter "*Computer II Final Order*").

[10] NPRM at ¶ 84 (emphasis added).

transport. For example, EarthLink's arrangement with AOL Time Warner has so far allowed it to offer service in almost forty markets. EarthLink has also entered into an arrangement with AT&T Broadband to offer service in the Seattle and Boston areas. However, these arrangements fall far short of ensuring widespread availability of multiple broadband ISPs to consumers.

More important is the fact that neither the AOL Time Warner agreement nor the AT&T arrangement can in any way be properly characterized as "voluntary." The AOL Time Warner arrangement was adopted under mandatory orders of the Federal Trade Commission and the FCC in connection with the merger of America Online and Time Warner. The limited AT&T market openings planned are simply the long-delayed and very partial implementation of a promise made by AT&T to the Commission in December of 1999, as set forth in a letter from AT&T and Mindspring (now part of EarthLink) to then-Chairman William Kennard. The promise did not arise out of anything that could accurately be described as purely commercial negotiations. Instead, AT&T was under pressure to show progress toward multiple ISP access in the context of its pending acquisition of MediaOne. Furthermore, were it not for AT&T Broadband's proposed merger with Comcast, it is doubtful as to whether they would have allowed even this limited access.

Put simply, the cable companies have made the decision – a decision that is economically incorrect in EarthLink's view – that they are better off not selling transport to unaffiliated ISPs. The only time that policy has been relaxed has been when the cable companies have sought regulatory approvals for mergers and the open access issue has arisen in those proceedings. To use the language of the question asked by the Commission in the NPRM, the

"absence of widespread business arrangements raises a level of concern" that is beyond "sufficient" to warrant Commission action.[11] Instead, the systematic exclusion of unaffiliated ISPs from the majority of cable systems nationwide, coupled with the complete absence of any reason to believe that such behavior will change voluntarily, demands immediate Commission action.

Furthermore, the cable companies' treatment of their own affiliated ISPs is as telling as their treatment of unaffiliated ISPs. As the NPRM correctly recounts, two of the three cable-owned ISPs, Excite @Home and High Speed Access Corp., filed for bankruptcy and were subsequently liquidated. The third cable-owned ISP, Road Runner, exists today only as a trade name.[12] This history – the Excite @Home chapter of which especially highlighted the danger to consumers of a lack of choice – indicates that cable companies are unwilling to deal on commercially reasonable terms even with their own affiliated ISPs, having run two of the three into bankruptcy. That track record argues strongly against any expectation that cable companies will, without some form of regulatory oversight, deal fairly with unaffiliated ISPs, especially those smaller ISPs that do not have the resources of a national player such as EarthLink. Even AOL, the nation's largest ISP, has to date been unable to negotiate access agreements with any cable MSO other than its affiliate Time Warner Cable.

3. The Multiple ISP Access Requirement Should Mirror the *Computer II* Requirements.

The NPRM asks at paragraph 74 what form the multiple ISP access requirement should take. As EarthLink has discussed at length in its

---

[11] *Id.*

[12] NPRM at ¶ 21 and footnotes thereto.

comments and reply comments in GN Docket No. 00-185, the *Computer* proceedings provide the proper framework for the requirement that the Commission should adopt. Thus, EarthLink answers in the affirmative the NPRM question of whether "the requirements imposed on telecommunications carriers by our Second or Third Computer Inquiries provide a useful model for a multiple ISP access regime?"[13] More specifically, the requirement should be the one enunciated in the *Computer II Final Order*, i.e., that facilities-based providers of information services must sell transmission to unaffiliated ISPs on the same terms and conditions that they sell that transmission to themselves or affiliated companies. In order to simplify enforcement and to prevent discrimination, the rates, terms, and conditions for such transmission should be publicly published.[14]

The *Computer II* model has much to recommend it. First, because EarthLink believes that the Ninth Circuit will follow its own precedent and hold that cable companies that use their own transmission facilities to provide Internet access services to the public for a fee are common carriers, adopting a regime now that focuses on the common carrier transmission portion of the service, as the *Computer II* unbundling requirement does,[15] will mean that the regime can remain in place without change if EarthLink's position prevails in court. Second, from a practical perspective, the approach makes sense because

---

[13] NPRM at ¶ 88 (footnote omitted).

[14] *Computer II Final Order* at 474. As EarthLink has pointed out previously, this *Computer II* "unbundling" requirement is different from and less extensive than the "unbundling" requirements imposed on ILECs by section 251(c) of the Act, 47 U.S.C. § 251(c). Reply Comments of EarthLink, Inc. in GN Docket No. 00-185 at 28 n.84 (January 10, 2001).

[15] *Computer II Final Order*, 77 F.C.C.2d at 433.

it is one with which the Commission and the industry have substantial experience. Accordingly, it would be unnecessary to engage in protracted or complicated rulemaking proceedings to implement the requirement; that work has already been done. Third, the *Computer II* unbundling model is the least intrusive approach available that will reliably deliver the desired policy objective. Cable companies would only be required to provide to others the transmission that they provide to themselves or their affiliates. Thus, the proposed requirement would not require any cable company to provide any transmission capability that it did not choose to provide. In other words, cable companies would remain free to decide whether and where to provide Internet access services. Where they did so, however, they would have to sell their transport to other ISPs. Finally, because the requirement focuses solely on transmission, its application is consistent with the Commission's stated goal of avoiding regulation of the Internet. No information services would be regulated as such under a *Computer II* model, a point that is discussed further below in the context of the scope of the Commission's ancillary jurisdiction.

4. The Commission Has The Statutory Authority To Adopt A Multiple ISP Access Requirement.

As discussed above, EarthLink believes that the Act itself already regulates the cable-based transmission underlying Internet access services as a common carrier telecommunications service under Title II of the Act. Recognizing, however, that it is not this clear authority that the Commission intends to assert in support of any multiple ISP access provision, EarthLink focuses here on the "ancillary jurisdiction" questions raised by the NPRM. Again, these comments are offered only in the context of responding to the

Commission's NPRM questions, and are without prejudice to EarthLink's position in its appeal of the Declaratory Order.

The Commission requests comment regarding the nature and scope of its "ancillary jurisdiction" to regulate "in the absence of explicit regulatory authority. . . ."[16] The NPRM goes on to recount that the Commission in *Computer II* asserted ancillary jurisdiction over "enhanced services," now known under the Act as "information services."[17] The Commission then asks whether an assertion of ancillary jurisdiction here over cable modem service would be analogous to the Commission's assertion of ancillary jurisdiction over enhanced services in *Computer II.*[18] Finally, the Commission asks whether there are any other bases for asserting ancillary jurisdiction.[19]

With due respect, EarthLink believes that the Commission is making this harder than it needs to be. Although the Commission correctly points out that it stated in *Computer II* that it had ancillary authority to regulate enhanced services, it fails to note that it expressly chose <u>not</u> to exercise that power.[20] The *Computer II* "unbundling" requirement was based not on the Commission's ancillary jurisdiction, but on the Commission's express Title II jurisdiction over the common carrier transmission component of the service:

> From the perspective of the regulator, a major benefit in not classifying services within the enhanced category is that <u>the scope of Commission regulation is focused on those services that are clearly within the contemplation of the Communications Act and which serve as</u>

---

[16] NPRM at 75.

[17] *Id.* at 76.

[18] *Id.* at 79.

[19] *Id.*

[20] *Computer II Final Order*, 77 F.C.C. 2d at 433.

> the foundation for all enhanced services. . . . This structure enables us to direct our attention to the regulation of basic services and to assuring nondiscriminatory access to the common carrier telecommunications facilities by all providers of enhanced services.[21]

The Commission in the Declaratory Order properly relied on the statutory definition of "information service" and correctly found that there is a "telecommunications" component to cable modem service.[22] Because it is this telecommunications component (as opposed to the "enhanced" component) of cable modem service that must be regulated in order to provide multiple ISP access, it is entirely unnecessary to speculate about the scope of the Commission's ancillary jurisdiction over "information services." The part of cable modem service that makes it an information service is simply not implicated here. Instead, the issue becomes one of whether the Commission has authority to regulate "telecommunications" that is not (according to the Commission) a "telecommunications service." This is a subject much closer to the Commission's core authority, and notwithstanding the fact that the Commission has significantly complicated its task by erroneously repudiating its clear Title II authority, EarthLink believes that the Commission retains sufficient authority to require multiple ISP access.

As the Commission properly notes, the Act provides that:

> The provisions of this act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission . . . .[23]

Section 3(52) of the Act (47 U.S.C. § 153(52)), in turn, provides that:

---

[21] *Id.* at 429 (emphasis added).

[22] NPRM at ¶ 39.

[23] 47 U.S.C. § 152(a).

> The term "wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things the receipt, forwarding, and delivery of communications) incidental to such transmission.

Inasmuch as cable modem service is an information service that by definition is provided "via telecommunications," and "communication by wire" is broader than the definition of "telecommunications," it is plain that the telecommunications here involved is within the scope of the Act and thus within the scope of the Commission's jurisdiction. In this regard it should be kept in mind that the proposed "unbundling" and nondiscriminatory sale requirements proposed here would not inherently subject the cable companies to full Title II regulation. If the multiple ISP access provision were adopted on a basis other than common carriage, for example, section 214 discontinuance procedures and section 251 interconnection requirements would be inapplicable unless imposed through a separate proceeding. This fact may distinguish, for example, the difficulties that the Commission encountered in *Southwestern Bell Telephone Co. v. F.C.C.*, 19 F.3d 1475, 1481 (D.C. Cir. 1994)(Commission reversed for imposing "full regulatory power under title II" without adequate statement of basis for doing so).

For all of the reasons stated above, EarthLink believes that the Commission has the authority to adopt a multiple ISP access requirement identical to the *Computer II* unbundling/non-discriminatory resale provision.

5. The Commission May Not Forbear From Title II Regulation Of The Transmission Portion of Cable Modem Services.

The Commission requests comment as to whether it should forbear from applying Title II regulation to the extent that the courts hold that the transmission portion of cable modem service is a "telecommunications service." For the reasons stated below, the Commission should not forbear and indeed may not legally forbear in this proceeding.

The section 10 forbearance authority authorizes the Commission to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services" upon the making of three concurrent determinations.[24] The forbearance provision applies only to "telecommunications carriers" (providers of telecommunications services) and "telecommunications services." The Commission in the *Declaratory Order* has held that the service at issue is not and does not contain a telecommunications service.[25] Under the Commission's own logic, therefore, the forbearance authority that the Commission seeks to invoke is clearly inapplicable.

The Commission has obviously proposed the forbearance action in the alternative. That is, if the Ninth Circuit overturns the Commission's statutory classification ruling, the Commission proposes to negate that ruling through forbearance. That the Commission offers this action in the alternative does not save it. The fact is that the mandatory statutory analysis prescribed by section 10 deals with "telecommunications services" and how the regulation of those services affects the customers of those services and competition among

---

[24] 47 U.S.C. § 160.

[25] NPRM at ¶ 39.

providers of those services. It is logically impossible on a record that begins with the proposition that cable modem service is not and does not contain a telecommunications service to meaningfully analyze how regulation of that service would fare under section 10 if it were a telecommunications service. Even were such analytical gymnastics possible or permissible, the Commission has done virtually nothing in the NPRM except to parrot the statutory standards and then to glibly state that application of those standards indicates that forbearance is appropriate. That, respectfully, falls far short of the reasoned analysis required to uphold an agency action.[26]

The Commission does articulate one specific reason as to why it would forbear:

> The Commission has a long history of classifying information services as Title I services and thus not subject to the obligations and requirements imposed on services subject to Title II. Given that cable modem service will be treated as an information service in most of the country, we tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service.[27]

It is difficult to say which of these two sentences is the more troubling. The footnote (332) to the first sentence refers to footnote 139 of the NPRM for a list of authorities that ostensibly support the conclusion that the Commission has never regulated any component of information services under Title II. In fact, each and every one of the authorities cited in footnote 139, beginning with

---

[26] For example, the Commission provides the following list of "reasons" why forbearance is appropriate: "[c]able modem service is in its early stages; supply and demand are still evolving; and several networks providing residential high-speed Internet access are still developing." NPRM at ¶ 95. Nowhere is there any discussion of the basis for these vague conclusions, and nowhere is there any analysis of how these factors, even if supported by demonstrable facts, have any bearing on the statutory forbearance criteria.

[27] *Id.* (footnote 332 omitted).

the *Computer Inquiries* and ending with the *Non-Accounting Safeguards* proceeding, is premised on the bedrock principle that every information service offered to the public for a fee is provided over a common carrier (Title II) telecommunications service. For the record, therefore, EarthLink categorically disagrees with the Commission's characterization of its own precedent, precedent that actually holds precisely the opposite of the proposition for which it is offered.

The second quoted sentence appears unequivocally to announce the Commission's intent not to consider itself bound outside of the Ninth Circuit if it loses the statutory classification appeal pending there. If EarthLink misunderstands the Commission's meaning, then EarthLink respectfully requests that the Commission immediately clarify its statement. If the words mean what they appear to say, however, then EarthLink respectfully urges the Commission to revisit and revise its understanding of the relationship of the courts and executive agencies. Petitions for review of the Commission's Declaratory Order have been filed in the United States Courts of Appeal for three separate circuits: the D.C. Circuit, the Ninth Circuit, and the Third Circuit. Those petitions were consolidated by order of the Multidistrict Litigation Panel pursuant to a statutorily mandated lottery system. The Commission's announced intent to disregard outside of the Ninth Circuit what it appears to anticipate as a negative outcome in that court would effectively deny judicial review to the petitioners that filed in Circuits other than the Ninth. In addition to demonstrating a disregard for the law that taints this entire proceeding, the Commission's proposed course places it squarely at odds with constitutional concepts of due process.

Setting aside these serious concerns regarding the Commission's view of its relationship to the federal judiciary, the statement that forbearance is necessary to achieve uniform national treatment does nothing to explain how that "uniform regulation" (i.e., exemption from all common carrier obligations) is consistent with the mandatory section 10 criteria.[28] Put differently, consistency for its own sake is no reason for forbearance. Indeed, the statute specifically makes reference to forbearance for classes of telecommunications carriers or telecommunications services "in any or some of its or their geographic markets. . . ."[29] If anything, that language suggests that national uniformity is not a legitimate reason for forbearance under section 10.

In addition to these reasons appearing on the face of the document and under the plain language of the statute why forbearance is inappropriate, EarthLink notes that it is categorically impossible for the Commission ever to make the first required finding under section 10 unless there is a legally enforceable mechanism for ISPs to gain access to the cable platform. That is the case because the cable companies' near-complete refusal to provide transmission upon reasonable request is *per se* "unjustly and unreasonably discriminatory."[30] It is precisely this sort of refusal to provide service that is explicitly prohibited by sections 201 and 202 of the Act, and it is the essence of the common carrier obligation to observe those prohibitions. The concern is only heightened when the telecommunications carrier refusing service to an ISP controls the very transmission platform that the ISP requires to compete with

---

[28] 47 U.S.C. § 160.

[29] *Id.*

[30] 47 U.S.C. § 160(a)(1).

that telecommunications carrier in the Internet access service market. To forbear under those conditions would be to write the common carrier obligations out of the statute. That is something that only Congress, not the Commission, may do.

For all of the foregoing reasons, the Commission may not forbear from enforcing fundamental common carrier requirements against cable companies that sell Internet access services to the public over their own facilities.

6. Conclusion.

All indications are that the cable industry is largely maintaining its early lead in the high-speed Internet access market even as that market is growing. At the same time, the Commission accurately cites facts indicating that ILEC DSL providers and cable companies appear to be foregoing competition in preference for raising prices in their natural monopoly regions. These are strong signs that it is not too early to take action, but rather that action should have been taken long ago to ensure competition and consumer choice in the high-speed Internet access market. Moreover, it is now abundantly clear that there will be no "voluntary" solution. The cable companies have for years been free to open their networks, but they have chosen uniformly not to unless ordered to do so.

The Commission retains both the authority and the statutory duty to address the serious and growing restrictions that cable companies have placed on competition in the high-speed Internet access market. By adopting a requirement that cable companies that use their networks to provide Internet access to the public for a fee must sell the underlying transmission to other

ISPs on the same terms and conditions and at the same rates as they sell it to themselves and their affiliated ISPs, the Commission can set the stage for competition and innovation in broadband Internet access that will match and then surpass the phenomenal success of the dial-up Internet. EarthLink and other national and regional ISPs are ready, willing, and able to extend their broadband offerings to customers everywhere cable goes, but we require that the Commission take the simple steps outlined above to allow us to fulfill that potential.

Respectfully submitted,

John W. Butler
Earl W. Comstock
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036

Dave Baker
EarthLink, Inc.
Vice President for Law
and Public Policy
1375 Peachtree Street
Atlanta, GA 30309

June 17, 2002