

WRITER'S DIRECT DIAL
(202) 463-2514

August 6, 2002

VIA MESSENGER

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

RECEIVED

AUG - 6 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: EarthLink, Inc. Reply 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 nine copies of the Reply Comments of EarthLink, Inc. in the above-referenced matter, including 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,



Earl W. Comstock
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

AUG - 6 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY COMMENTS OF EARTHLINK, INC.

John W. Butler
Earl W. Comstock
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-2500

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

August 6, 2002

Table of Contents

	Page
I. Introduction	1
II. The Record Does Not Support Section 10 Forbearance for Cable Modem Service	3
III. There is No First or Fifth Amendment Bar to Implementation of Computer II Open Access.....	7
A. The First Amendment.....	7
B. The Fifth Amendment	8
IV. Conclusion	9

**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)	

REPLY COMMENTS OF EARTHLINK, INC.

I. Introduction

EarthLink, Inc. (“EarthLink”) respectfully submits these reply 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 – remains of critical importance to EarthLink and its customers.

As EarthLink and others explained in their June 17, 2002 comments in this proceeding, it is imperative that the Commission act now to require cable operators that use their own facilities to provide Internet access service to the public for a fee to sell the underlying transmission

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 reply comments, EarthLink will once again cite to the document as the “*NPRM*,” regardless of the location of the cited paragraph within the document.

capacity to unaffiliated ISPs on nondiscriminatory terms and conditions.² EarthLink has demonstrated through its numerous submissions in the *Cable Modem NOI*³ that led up to this *NPRM* that cable modem service providers are telecommunications carriers subject to the same Title II non-discrimination requirements⁴ and *Computer II* unbundling obligations⁵ that apply to all other competitive common carriers. In addition, the comments filed in this proceeding by the Department of Justice illustrate once again that the Commission's flawed declaration⁶ that cable modem service does not contain a telecommunications service component has far reaching impacts that are contrary to Congressional intent and the public interest.⁷

² *Comments of the People of the State of California and California Public Utilities Commission*, CS Docket 02-52 (June 17, 2002) at 2 and 6; *Comments of the Association of Communications Enterprises*, CS Docket 02-52 (June 17, 2002) at 15; *Comments of Amazon.com*, CS Docket 02-52 (June 17, 2002) at 9.

³ *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket 00-185 (*Cable Modem NOI*).

⁴ Title II of the Communications Act of 1934 (47 U.S.C. § 201 *et seq.*). See in particular sections 201 and 202 of the Act (47 U.S.C. §§ 201 and 202.).

⁵ *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) at 433, 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). See *Reply Comments of EarthLink, Inc.* in GN Docket 00-185 (January 10, 2001) at 28, n.84.

⁶ *NPRM*, ¶ 7.

⁷ The Department of Justice and the Federal Bureau of Investigation (FBI) filed comments in this proceeding asking the Commission to promulgate rules to preserve their authority under the Communications Assistance for Law Enforcement Act (CALEA). *Comment of the Department of Justice and Federal Bureau of Investigation*, CS Docket 02-52 (June 17, 2002) (*FBI Comments*). Unfortunately, if the Commission persists in its determination that cable modem service is an integrated information service that does not include a telecommunications service component, it seems statutorily impossible for the Commission to accommodate the FBI's request. The definition of "telecommunications carrier" under CALEA is limited to "persons or entities engaged... as a common carrier for hire" and does not include any such persons or entities "insofar as they are engaged in providing information services." 47 U.S.C. § 1001(8)(A) and (C). Despite suggestions in the *FBI Comments* regarding possible means for reconciling the difficulty posed by the Commission's information services determination, none of them can overcome the plain language used by Congress in the definition. Compare *FBI Comments* at 8 (n. 7) and 9-11 with 47 U.S.C. § 1001(8)(A) and (C). As the FBI points out, "exemption of broadband facilities could relegate CALEA, along with public safety, law enforcement, and national security goals, to obsolescence." *FBI Comments* at 7.

EarthLink has sought review in the courts⁸ of the Commission's declaration that cable modem service is an information service that does not contain a separate telecommunications service component, and will not repeat here its legal arguments regarding the application of Title II and *Computer II* to the transmission component of cable modem service in these reply comments. Instead, these reply comments address the legal insufficiency of the Commission's record to forbear from applying Title II or *Computer II* requirements in the event the 9th Circuit reaffirms its previous ruling⁹ that cable modem service does contain a telecommunications service component, as well as the inapplicability of First Amendment or Fifth Amendment challenges to an open access requirement.

II. The Record Does Not Support Section 10 Forbearance for Cable Modem Service.

Contrary to the assertions of Cox¹⁰ and the Commission's tentative conclusion,¹¹ the record of the *Cable Modem NOI* and the present *NPRM* contain no facts or analysis on which the Commission could base a forbearance decision under section 10 of the Communications Act.¹² Section 10 applies only to provisions of the Act and regulations promulgated under the Act that apply to "telecommunications carriers"¹³ and "telecommunications services." As a threshold matter, the Commission has determined that cable modem service is an "information service"¹⁴

⁸ *Brand X Internet Services, Inc. v. FCC*, Case No. 02-71425, and consolidated cases (9th Cir., pending).

⁹ *AT&T Corporation v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

¹⁰ *Comments of Cox Communications, Inc.*, CS Docket 02-52 (June 17, 2002) (*Cox Comments*) at 64-67.

¹¹ *NPRM*, ¶ 95.

¹² 47 U.S.C. § 160.

¹³ *Id.*

¹⁴ 47 U.S.C. § 153(20).

with no separate telecommunications service component, and has proceeded with its analysis of potential impacts on that basis. As a result, the Commission has conducted no analysis of whether the statutory criteria of section 10 are met if cable modem service contains a “telecommunications service.”

In fact, if the transport component of cable modem service is a telecommunications service, the record is clear that forbearance would not be permitted. Congress explicitly required that every provider of telecommunications services “*shall* be treated as a common carrier” under the Communications Act.¹⁵ ISPs are today being unreasonably denied access to cable modem service in violation of sections 201 and 202 of the Act,¹⁶ and there is no information in the record of this proceeding (or any other Commission proceeding) regarding whether the rates being charged to ISPs by cable operators for the transport component of cable modem service (either under agreements mandated by the Federal Trade Commission and Commission orders in the AOL/Time Warner merger¹⁷ or under other agreements) are in fact just and reasonable.¹⁸ Further, the bankruptcy of Excite@Home is an example of how an ISP with exclusive access to cable modem service was run out of business by the rates charged for transport by the underlying

¹⁵ 47 U.S.C. § 153(44) (emphasis added). It is important to note that Congress added the definition of “telecommunications carrier” to the Act in 1996. The statutory language does not grant the Commission any discretion with respect to treating a cable or other wireline provider of telecommunications services as a common carrier. Contrary to the assertions of many of the cable commentators, no “market failure” analysis is involved in determining who is initially subject to common carrier regulation under the plain language that Congress expressly adopted only six years ago.

¹⁶ 47 U.S.C. §§ 201 and 202.

¹⁷ *See In the Matter of America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 (FTC) (proposed Dec. 14, 2000) and *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, CS Docket 00-30 (released January 22, 2001) (*AOL Time Warner Order*) at ¶ 126.

¹⁸ In fact, the Commission has found that AOL Time Warner has the incentive and ability to discriminate against other ISPs that want to use its cable networks. *AOL Time Warner Order* at ¶ 86.

facility owner. The Commission cannot make the determinations required under section 10(a)(1) without first having conducted a proceeding to obtain the necessary information and public comment on cable operator charges and practices for transport provided under existing compulsory and voluntary agreements.¹⁹

In addition, the Commission cannot make the requisite consumer and public interest determinations required under sections 10(a)(2) and 10(a)(3) of the Act without examining the impact of resale competition on consumer price and the effect of special regulatory treatment for cable operators on the ability of other competitive telecommunications carriers to offer services to consumers. Again, the empirical evidence before the Commission indicates that consumer prices for high-speed Internet access services are increasing with the demise of CLECs offering service to residential and small business customers. Further, the Commission has not explained (1) why consumers should be denied the same choice in broadband Internet access providers that they currently have in narrowband Internet access providers; (2) why consumers and ISPs should not be allowed to purchase broadband transport services in the same manner that they presently purchase narrowband transport services; or (3) how having either one monopoly provider of broadband information services (either the cable operator or the incumbent telephone company) or a duopoly choice between the two benefits consumers or accomplishes the pro-competitive goals Congress sought to achieve in the Telecommunications Act.

¹⁹ Review of these agreements would provide the Commission with more accurate information on the nature of the business and technical arrangements already in place between ISPs and the underlying cable transport facility owners, allowing a better assessment by the Commission of the many false claims made by the cable industry regarding the technical and regulatory infeasibility of multiple ISP access. EarthLink notes that cable industry threats to “cease providing [cable modem] service to all subscribers” (*Cox Comments* at 73) would be a violation of section 214 of the Act to the extent that cable modem service includes a telecommunications service. 47 U.S.C. § 214.

Likewise, the Commission meets itself coming and going on the public interest analysis. In another recent proceeding to remove regulations from telecommunications carriers, the Commission assured ISPs that they would continue to have access to transport networks by reaffirming that CLECs and other competitive telecommunications providers remain subject to the unbundled transport requirements of *Computer II* and the non-discrimination safeguards contained in sections 201 and 202 of the Act.²⁰ Given that the Commission found these safeguards were still necessary to protect ISP access to networks, and considering the significant advantages cable operators enjoy over other competitive telecommunications carriers – for example, networks that are largely deployed, an embedded customer base and revenue stream from cable services, access to poles and conduits at discounted rates, and better access to capital – it is difficult to imagine how the Commission could affirmatively find that continued favorable treatment for those telecommunications carriers that already have the largest share of the residential broadband market would “promote competition among providers of telecommunications services”²¹ or otherwise be in the public interest.²²

²⁰ See *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 7418 (rel. March 30, 2001) at 7442 (¶ 40) and 7745-46 (¶ 46).

²¹ 47 U.S.C. § 160(b). Cox’s claim that forbearance “certainly would continue to promote competition among Internet access providers” is clearly incorrect. *Cox Comments* at 75. Access by independent ISPs to the cable transport network has been at the heart of this proceeding and the *Cable Modem NOI* before it. Competition among broadband Internet access providers is at present limited to the ISP owned by or affiliated with the cable owner and those few ISPs who have been able to obtain access through compulsory or voluntary agreements. Application of the non-discrimination requirements of sections 201 and 202, as well as the unbundling requirements of *Computer II*, would promote competition among Internet access providers by allowing all ISPs to compete using cable transport facilities. In contrast, continued unlawful forbearance by the Commission will further limit competition, not promote it.

²² The public interest also would not be served by exempting cable modem transport services from section 214 of the Act, which gives the Commission the authority to require a common carrier to continue providing service. 47 U.S.C. § 214. If multiple ISPs have access to the transport service, the demise of a single ISP would not leave consumers without Internet access service. By allowing multiple ISP access through the use of the non-discrimination requirements of sections 201 and 202 of the Act and *Computer II* unbundling, and by using its authority under section 214 of the Act, the Commission can prevent the type of consumer harm that occurred from the bankruptcy of Excite@Home.

III. There is No First or Fifth Amendment Bar to Implementation of Computer II Open Access.

Comments filed by the cable industry and incumbent local exchange carriers (ILECs) incorrectly suggest that the Commission faces constitutional barriers to its ability to implement a non-discriminatory open access regime for cable modem service or other high-speed information services. These arguments fundamentally misrepresent the law and the nature of the open access regime being debated.

A. The First Amendment

The statutory definition of “information services” states that the services in question are provided “via telecommunications.”²³ The Communications Act defines “telecommunications” as the “transmission, between or among points specified by the user, of *information of the user’s choosing*, without change in the form or content of the information as sent and received.”²⁴ The definitions provided by Congress make it clear that an “information service” involves the manipulation, storage, forwarding, or making available of information under the control of the user, not the facility owner or content provider. In contrast, the definition of “cable service” is predicated on the idea that the cable operator in general does control the content of the transmission.²⁵ This clear statutory distinction means that for the purposes of a First Amendment analysis involving information services it is the *user’s* speech that must be considered, not the facility owner’s. As a result, an open access requirement imposed by the Commission on the

²³ 47 U.S.C. § 153(20).

²⁴ 47 U.S.C. § 153(43) (emphasis added).

²⁵ 47 U.S.C. § 522(6). *See also* H.R. Rept. 98-934 (1984) at 41-44.

owners of facilities used to transport information services to the public does not raise First Amendment concerns precisely because the facility owner does not control the content of the information services transmitted by users over its facilities.²⁶

B. The Fifth Amendment

The cable industry and the ILECs also argue in unison that imposition of a *Computer II* unbundling requirement would involve the Commission in burdensome price regulation proceedings in order to prevent a successful Constitutional takings claim under the Fifth Amendment. The Fifth Amendment prohibits the taking of private property for public purposes without “just compensation.” Each of the commentators ignores the more than 20 year history during which the Commission has successfully applied the *Computer II* unbundling requirement to interexchange carriers, competitive access providers, and CLECs without any burdensome price proceedings or other intrusive regulations.

It is simply not possible for a cable operator or an ILEC to make a Fifth Amendment takings claim under the *Computer II* unbundling requirement as instituted by the Commission since 1980. For non-dominant providers (which the cable operators would be, at least initially), the *Computer II* obligation is simple – a carrier must make available to other ISPs any underlying transport service on the same terms and conditions that the carrier provides that transport service to itself or an affiliate when it chooses to use its own facilities to provide an information service to the public for a fee. Therefore, the facility owner – in this case the cable operator – determines the conditions and fees under which the transport service is provided based on what it

²⁶ In as much as the open access required under *Computer II* and Title II of the Act only applies to the “telecommunications” (i.e., transmission) component of cable modem services, an open access requirement would in no way impact a cable operator’s editorial control over any content it seeks to offer to its subscribers.

chooses to impose on itself. At present, the burden is generally on the ISP to show that the charges of a competitive carrier are not reasonable or are otherwise discriminatory before the Commission will take corrective action under sections 201 and 202 of the Act. In the case of ILECs, state public utility commissions or the Commission's own rules generally determine what price can be charged. A price charged by the facility owner that is not found to be unreasonable under section 201 or 202 invariably provides just compensation under the Fifth Amendment.

IV. Conclusion

The Commission's tentative findings and conclusions in the *NPRM*, as well as the comments submitted in support of the Commission by the cable industry and ILECs, all choose to focus almost exclusively on only two of the many provisions that were included in the Telecommunications Act of 1996. Those two provisions – section 230 of the Communications Act²⁷ and section 706 of the Telecommunications Act²⁸ – were a small part of a much broader reform bill through which Congress updated and refined the 60 year old Communications Act. Included in that modernization were numerous explicit regulatory commands that the Commission, the cable industry, and the ILECs have chosen to ignore almost entirely in this proceeding (and in many others as well).

Congress explicitly directed that every provider of telecommunications to the public for a fee “shall be treated as common carrier,”²⁹ “regardless of the facilities used,”³⁰ yet the

²⁷ 47 U.S.C. § 230.

²⁸ 47 U.S.C. § 157 note.

²⁹ 47 U.S.C. § 153(44).

Commission has striven mightily in this proceeding to avoid executing Congress' clear command. The cable industry and ILECs would also have the Commission believe that "broadband" services are a new creature, beyond the understanding of Congress when it enacted the Telecommunications Act.³¹ It is possible to arrive at this ridiculous conclusion only by ignoring all of Title V of the Telecommunications Act (regarding Internet pornography), the numerous references to technological neutrality and "advanced telecommunications and information services" in many sections added to the Act, and the extensive record of Congressional hearings on the "information superhighway" that led up to enactment of the 1996 Act.³² It is not without irony that EarthLink notes that the two provisions most cited by the Commission and its allies as justifying its deregulatory actions – section 230 of the Communications Act and section 706 of the 1996 Act – both demonstrate quite clearly that Congress crafted its 1996 amendments to the Communications Act with the clear expectation that both the Internet and broadband services would be the principle services of interest to consumers in the 21st Century.

In closing, EarthLink notes for the record that it categorically disagrees with the representations made by AOL/Time Warner with respect to the operation and implementation of

³⁰ 47 U.S.C. § 153(46).

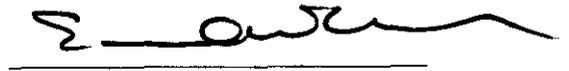
³¹ One cable company even goes so far as to claim that "Congress has not given any level of government the authority to impose intrusive regulations on cable modem services" and that "[c]onsequently, the Commission should confirm that there is no legal or policy basis for imposing federal, state, or local access and other regulations on cable modem service." *Cox Comments* at 75. Nothing in the plain language of the amendments made by the 1996 Act or its legislative history supports this absurd claim that Congress intentionally created a regime in which a service being indiscriminately provided over public rights of way to millions of subscribers is subject to no government oversight or authority.

³² See *Reply Comments of EarthLink, Inc.*, GN Docket 00-185 (December 1, 2000) at 39 – 50.

the multiple ISP access agreements under which EarthLink provides service over Time Warner's cable facilities. EarthLink is unable to comment in detail on these arrangements due to a non-disclosure clause included in the agreements. Before making any decision based on the representations made by AOL/Time Warner with respect to these agreements, the Commission should in an appropriate proceeding obtain, examine, and accept comments from parties to the agreement on the terms and conditions of those agreements.

EarthLink once again respectfully calls on the Commission to implement the law as Congress wrote it. Internet access provided over broadband facilities should be subject to the same *Computer II* and Title II non-discrimination rules that made Internet access over narrowband facilities an unqualified success. To do otherwise puts the future of the competitive Internet in jeopardy.

Respectfully submitted,



John W. Butler
Earl W. Comstock
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-2500

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

August 6, 2002