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Via Hand Delivery

September 5, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Oral *Ex Parte* Presentation
CC Docket Nos. 01-338; 01-337; 02-33; 98-147; 98-10; 96-98; 95-20

Dear Ms. Dortch:

On September 4, 2002, Gary Betty, CEO of EarthLink, Dave Baker, Vice President, EarthLink, and the undersigned met with the following Commissioners and their staff: Chairman Michael Powell, Marsha McBride (Chief of Staff), and Christopher Libertelli (Legal Advisor); Commissioner Kathleen Abernathy and Jason Scism (Special Assistant); Commissioner Michael Copps, Paul Margie (Legal Advisor), and Jordan Goldstein (Senior Legal Advisor).

In these meetings, EarthLink described generally its business, including its broadband subscriber base. EarthLink has invested heavily in deployment of its high-speed Internet services, and has spent over \$300 million in the past three years to deploy broadband services. EarthLink also made several points that it has previously filed in comments and reply comments in the above-referenced dockets, as well as some of the points explained in the attached bullet-sheet presented to each of the Commissioners at the three meetings. Specifically, EarthLink discussed the importance of Title II and *Computer Inquiry* rules for ISPs to obtain access to incumbent LEC wholesale DSL service, and the legal underpinnings of common carrier status of incumbent LEC services as explained in its prior filings. EarthLink explained that incumbent LECs have offered DSL service to ISPs for several years as a telecommunications service, and ISPs have in turn served to promote incumbent LEC DSL and advanced services. However, incumbent LECs have still continued to cross-subsidize their unregulated ISP operations which have permitted the incumbent LECs to take a significant lead in DSL-based broadband Internet services. While improvements to incumbent LEC processes have occurred over time, it is important to retain regulatory oversight of incumbent LEC wholesale DSL access. EarthLink

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also discussed how it works with alternate technologies to offer choices and competition to the last-mile. EarthLink also intends to offer lower-cost high-speed Internet access solutions for consumers, but this depends on its ability to purchase wholesale DSL services at an economic price. EarthLink continues to develop innovative ISP products for consumers, such as anti-spam and "pop-up" solutions.

While it currently can be difficult for EarthLink to negotiate access arrangements with incumbent LECs, a reversal of ISP access rights would make such access arrangements even more difficult for ISPs. In EarthLink's view, while Title I regulation of incumbent LECs may be possible, it would impose additional legal uncertainty and business risk for ISPs than continued Title II jurisdiction over DSL services. Instead, EarthLink would propose that the FCC streamline current *Computer Inquiry* regulations applicable to broadband, and effectively enforce those obligations under Title II of the Act.

Further, EarthLink discussed briefly that it supports UNE access for competitive LECs as an alternative supplier of wholesale broadband services. EarthLink described that Covad is a significant supplier of DSL to EarthLink as well as the incumbent LECs. However, incumbent LECs have rolled out DSL only in response to competitive pressures, and the FCC should continue to support UNE-P based services, such as WorldCom's Neighborhood service, with definitive and timely orders on such pending issues.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, 16 copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Sincerely,



Mark J. O'Connor
Counsel for EarthLink, Inc.

CC: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Marsha McBride
Christopher Libertelli
Jason Scism
Paul Margie
Jordan Goldstein

Ex Parte Presentation

CC Dkt. No.s 02-33, 01-337, 98-10, 95-20

EarthLink, Inc. September 4, 2002

The Importance of Nondiscriminatory Access to Wireline Broadband Platforms

- Independent ISPs offer the public considerable benefits and compete on many levels, including price, customer service, privacy, e-mail services, spam control, availability of local access numbers, 800 number access, etc. (J.D. Power 2002 ISP Customer Satisfaction Report)
- Hundreds of thousands of retail consumers *currently* rely on non-discriminatory provisioning of ILEC wholesale DSL service to independent ISPs. The FCC has consistently treated DSL as a telecommunications service. (FCC *GTE DSL Order*; *Advanced Services MO&O*; *Advanced Services Second R&O*)
- Although EarthLink offers access over all *available* broadband platforms, DSL and cable account for about 97% of all broadband connections. Cable is largely foreclosed to EarthLink and other independent ISPs; DSL is often the only option available.
- Of DSL lines in service as of 12/21/01, about 97% were reported by ILECs. (July 2002 FCC *High Speed Services Status Report*)
- Removing ILEC-provided wholesale DSL from Title II and eliminating *Computer II* and *III* protections will lead to increased discrimination against non-affiliated ISPs and their customers, resulting in less choice, higher prices, and degraded service to end-users.
- The FCC has already granted ILECs pricing deregulation of wholesale DSL in the *Pricing Flexibility Order*, which permits BOCs to increase DSL prices once certain indicia of competition are in place. BellSouth has used this flexibility for DSL.
- EarthLink is willing to work to streamline the *Computer Inquiry* rules so long as rules are in place to ensure that ISPs have reasonable and non-discriminatory access, coupled with strong and effective enforcement.
- A desire for “parity” of regulation between DSL and cable modem service is not a valid basis for deregulation of DSL. The competitive realities of DSL should determine its level of regulation.
- Broadband deployment is extensive. According to the FCC’s own statistics, 98% of the population lives in zip codes where high-speed access is available. (July 2002 FCC *High Speed Services Status Report*)