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**FILED ELECTRONICALLY**

June 16, 2003

**EX PARTE**

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

Re: Notice of Oral *Ex Parte* Presentation  
CC Docket Nos. 02-33, 98-10, 95-20; 01-337

Dear Ms. Dortch:

On June 16, 2003, Dave Baker, Vice President for Law and Public Policy, EarthLink, Inc., Daniel Greenfield, Vice President for Corporate Communications, EarthLink, Inc., and the undersigned met with William Maher, Brent Olson, and Carol Matthey of the Wireline Competition Bureau to discuss the *Wireline Broadband* proceeding.

At the meeting, EarthLink restated positions described in documents previously filed in the above-referenced dockets. In addition, EarthLink explained that proposed rule changes to allow ILEC providers of DSL transmission service to offer superior rates, terms or conditions to affiliated or non-affiliated preferred ISPs would subject other, non-preferred ISPs to untenable competitive disadvantages. This would harm consumer welfare in the short term by reducing the quality and increasing the price of service from "non-preferred" ISPs and further harm it in the long run by eliminating the public benefits that flow from competitive broadband Internet access services. While EarthLink can agree with some points of the High Tech Broadband Coalition filed in the above-referenced dockets, a rule change permitting discriminatory pricing and provisioning would disserve the public interest.

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EarthLink further explained that current rules do not impair the BOCs' ability to negotiate for or to offer new services. EarthLink pointed to its own agreement with BellSouth as an example. BOCs are free to negotiate terms and prices for many services beyond basic transport, which is subject to tariffing and other nondiscrimination requirements. The ISP Access Rule proposed by AOL, EarthLink and MCI on May 1, 2003 (filed in CC Dkt. 02-33) would provide the BOCs with additional regulatory flexibility while maintaining appropriate safeguards. EarthLink also cited the FCC's December 2002 SBC-ASI order in CC Dkt. 01-337 as an example of deregulation with appropriate safeguards. The Verizon DSL tariff changes in April 2003 requiring end user authorization provide an example of how FCC regulatory oversight is necessary, and how it can prevent unreasonable conditions of service for ISPs. A shift to "private contracts" for transmission services, however, would permit unilateral BOC modifications, and would leave independent ISPs with no bargaining power.

Nor have the BOCs demonstrated any causative connection between current nondiscrimination requirements and their market position vis-à-vis cable. Deployment and adoption for broadband services in general and DSL-base broadband services in particular continue to grow.

EarthLink further objected to any date-certain "sunset" of Title II access obligations. If a revisitation period is warranted, EarthLink argued for a longer time period and for regulatory changes to be based upon a re-examination of status of competitive market conditions. Finally, in response to staff questions, EarthLink explained that *Computer III* unbundling obligations are not out-of-date, that MCI has explained that *Computer Inquiry* basic/enhanced definitions continue to have relevance as a technical matter today, and that the BOCs' real objections to *Computer III* unbundling and ONA may be that they allow ISPs to compete against BOC retail services and do not force the ISP to share revenues. *Computer III* has not impeded the BOCs from developing new information services. Rather, the lack of BOC ONA unbundling is a greater impediment to ISP deployment of new services, despite that ONA unbundling was directed by the *California III* court. Indeed, as EarthLink has previously shown, ISPs have made innovative use of the ONA service request process, including requests for symmetric DSL service.

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

Sincerely,

/s/

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