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**FILED ELECTRONICALLY**

June 20, 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 19, 2003, Dave Baker, Vice President for Law and Public Policy, EarthLink, Inc., and the undersigned met with Commissioner Kevin Martin, Senior Legal Advisor Daniel Gonzalez, and intern Michael Gray 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 stated that it agrees with the principle set forth by the High Tech Broadband Coalition (HTBC) that the Commission should maintain its policy requiring ILECs which provide affiliated ISPs with broadband transmission service to make the same transmission service available to unaffiliated ISPs on a nondiscriminatory basis.<sup>1</sup> However, EarthLink explained that proposed rule changes which would allow ILEC providers of DSL transmission service to offer superior rates, terms or conditions to non-affiliated preferred ISPs would subject other, non-preferred ISPs to untenable competitive disadvantages, resulting in diminished customer choice in broadband Internet service providers. Such a rule change permitting discriminatory pricing and provisioning would disserve the public interest.

EarthLink pointed out that the current rules give incumbent LECs flexibility. Incumbent LECs are allowed to negotiate private terms on non-transmission services. EarthLink referenced

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<sup>1</sup> For purposes of reference, EarthLink also shared with Commissioner Martin the HTBC *ex parte* letters of April 4 and 11, 2003 (filed in CC Dkt. 02-33), but did not leave behind those filings.

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its own agreement with BellSouth as an example. The current rules also provide incumbent LECs with special access pricing flexibility. EarthLink also cited the FCC's December 2002 SBC-ASI order in CC Dkt. 01-337 as an example of deregulation with appropriate safeguards. Nondiscriminatory access to BOC wholesale broadband transmission services is essential to continuing customer choice in broadband ISP services, especially since a majority of cable systems do not have competitive ISPs available for consumers. Furthermore, despite notions of intermodal broadband competition, consumers tend not to switch broadband platforms, due to differing CPE requirements and long-term contracts including early termination charges, making broadband platforms especially "sticky."

EarthLink also noted that it supports the principles espoused by the Coalition of Broadband Users and Innovators that Internet users should be able to access any content, use any applications, and attach any non-interfering devices. EarthLink expressed that the best way to obtain these goals is by ensuring customer choice of ISP.

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. In EarthLink's view, an examination of competitive market conditions is required under Title II reclassification precedent, as EarthLink has described previously. In response to a question, EarthLink explained that it believes that it may be more rational for the FCC not to decide the issues in the *Wireline Broadband* proceeding until after the Ninth Circuit rules in the pending Cable Modem appeal.

EarthLink also explained to Mr. Gonzalez that the ISP Access Rule proposal submitted into the record of CC Dkt. 02-33 by EarthLink, MCI and AOL Time Warner on May 1, 2003, would provide the BOCs with additional regulatory flexibility while maintaining appropriate safeguards and a quicker enforcement process. (A copy of the May 1, 2003, *ex parte* submittal was also provided to Mr. Gonzalez.) EarthLink also noted that allowing private contractual arrangements with unaffiliated ISPs would create problems of enforcement, since the arrangements would be neither transparent nor available to independent ISPs.

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.