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JUN - 5 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 5, 2003

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

Re: Ex Parte Presentation, WC Docket Nos. 02-33, 98-10, 95-20; 01-337

Dear Ms. Dortch:

BellSouth files this presentation to explain the constitutional, statutory, Commission and judicial precedent that require the Commission to equalize the regulatory burden that its rules place on competing broadband services. The Commission's current approach of selectively regulating one set of providers is not legally tenable and threatens great consumer harm by handicapping one of the two types of major facilities-based competitors, thus tipping the competitive balance.

If the Commission's thumb remains on the scales any longer, the leading provider, cable, will become thoroughly entrenched, and the prospects for vibrant, head-to-head competition between cable and telephone ("wireline or "telco") providers such as will disappear. This will greatly harm consumers, who will lose out on competitive broadband Internet access, and will greatly harm ISPs, who will see their prospects for obtaining further access to cable networks dim as cable's share of the market becomes insulated from competition. Finally, it will harm the telephone companies that are investing in the network infrastructure to provide broadband services. Preserving forced ISP access to telco networks will not be a win for consumers or ISPs because that regulated access weakens the prospects for telco investment and innovation in broadband facilities and services. Without that investment and innovation, cable will entrench its current dominance of broadband access to the Internet, to the detriment of consumers and ISPs.

In the first section below, this letter discusses the legal basis for the Commission equalizing the regulatory burdens it imposes on broadband Internet access providers. The

First Amendment and the Act both require this result given the functional equivalence of the broadband services at issue in this proceeding. The second section shows that eliminating forced access to the telco broadband Internet network will not shut the door on ISPs. In particular, BellSouth has already negotiated agreements with large and small ISPs for innovative broadband access that go well beyond what BellSouth is required to offer. The Commission's current regulations slow the offering of these innovative services and raise their costs. The third section below discusses the reasons that broadband Internet access is not common carriage. Finally, this letter sets out the facts on the market position of telco and cable broadband Internet access services.

In several of the sections below, this letter responds to the comments and ex parte filings made by EarthLink, Inc. ("EarthLink") and others in the referenced proceeding. Specifically, this letter will (1) refute EarthLink's claims that any relaxation of the regulatory regime presently imposed upon ILEC-provided broadband transmission will harm retail or wholesale broadband competition, (2) establish that wireline transmission services do not meet the requirements for Title II common carriage, and (3) dispel EarthLink's claim that DSL-based broadband services are catching up to cable.

There can be no serious dispute that cable modem-based Internet access services provided by cable companies and DSL-based Internet access services provided by wireline companies such as BellSouth are equivalent and competing services in the retail residential and business markets for high-speed Internet access services. Presently, this market is being served by providers using several different wired and wireless platforms, with cable being the dominant provider.

Further, there can be no serious dispute that a vibrant competitive marketplace for broadband services will maximize consumer benefits through innovative service offerings, better service quality and lower prices. In order to maintain the long-term vitality of this competitive broadband marketplace and the concomitant benefits that will inure to the public, the Commission must not single out any one provider or service platform for regulation. The Commission's disparate regulation of one particular type of service provider increases that provider's costs and hinders that provider's ability to meet market demand with the same flexibility as its unregulated competitors, all to the detriment of competition and consumers. The risk of harm to the broadband marketplace is heightened where the Commission imposed regulation affects a non-dominant provider of the competitive services – in this case, wireline companies.

For all of the reasons expressed herein, the Commission should remove *Computer II/III* and Title II regulation from wireline-provided broadband services.

## I. A COMPETITIVE BROADBAND MARKET THAT MAXIMIZES CONSUMER BENEFITS DEPENDS ON THE COMMISSION'S RECOGNIZING ITS RESPONSIBILITY TO TREAT EQUIVALENT CABLE AND WIRELINE BROADBAND SERVICES ALIKE.

This section discusses the First Amendment and regulatory precedent that should move the Commission to regulatory parity in its treatment of cable and telco broadband access. EarthLink, in particular, has lately argued that the Commission cannot equalize the regulatory burdens it places on functionally identical services. On March 24 and April 29, 2003, EarthLink filed *ex partes* purporting to "explain the legal obstacles to using 'regulatory parity' as a basis for decision in the *Wireline Broadband* proceeding."[1] EarthLink's "explanation," however, is directly contrary to bedrock constitutional principles, statutory law, Commission and judicial precedent, ***and EarthLink's own prior advocacy***. Each of these sources stands squarely for the proposition that the Commission must adopt a functional approach that treats cable and wireline broadband services even-handedly.

### A. "As a Matter of Law There Is No Support In The Act For Different Regulatory Treatment Of These Identical Services Based Solely On The Type Of Facilities Used ...." – EarthLink (December 1, 2000).

EarthLink's March 24 and April 29 *ex partes* represent a dramatic departure from its prior insistence that the Act requires regulatory parity. In the *Cable Modem Proceeding*, EarthLink filed no less than fifty-nine (59) pages of detailed analysis explaining why the Commission must treat like offerings alike. Further, EarthLink argued that a Commission determination that cable modem transmission is "telecommunications," not a "telecommunications service," and is not subject to either *Computer II/III* or Title II common carriage requirements would necessitate similar conclusions for the equivalent wireline-provided services.

Specifically, in the *Cable Modem Proceeding*, EarthLink:

(1) Recognized the dominance of the cable modem transmission platform: "When these customer preference trends are combined with the tremendous rate of growth in broadband demand

[1] *See* Ex Parte Letter from Kenneth R. Boley, Counsel for EarthLink, Inc., to Marlene Dortch, Secretary, FCC (Mar. 24, 2003) ("March 24 *ex parte*"); Ex Parte Letter from Mark J. O'Connor, Counsel for EarthLink, Inc., to Marlene Dortch, Secretary, FCC (April 29, 2003) ("April 29 *ex parte*"). Other parties have made similar arguments. *See Ex Parte* Letter from Jonathan Jacob Nadler, Counsel to the Information Technology Association of America ("ITAA"), to Marlene Dortch, Secretary, FCC, at 14-15 (Oct. 17, 2002)("*ITAA ex parte*").

generally, it becomes clear that cable-based broadband is the dominant form of broadband Internet access"[2];

(2) Recognized that the Commission "has found on numerous occasions that Congress intended the 1996 Act to be technologically neutral ..."[3];

(3) Affirmatively stated that there is "[a]s a matter of law ... no support in the Act for different regulatory treatment of these identical services based solely on the type of facilities used ..."[4];

(4) Recognized that it is unable "to determine any principle that would allow the Commission to use its forbearance authority with respect [to] cable modem services, but not with respect to the facilities-based transmission of information services by other telecommunications carriers, including dominant and non-dominant local exchange carriers."[5]; and finally,

(5) Recognized "the Act's fundamental premise that regulation of telecommunications services is to be technologically neutral."[6]

EarthLink was not alone in recognizing the "fundamental premise" that regulations are to be "technologically neutral." Those principles were broadly recognized in the *Cable Modem Proceeding*. *See*, *e.g.*, Comptel at 35 (the Act's definitions "are not based on the type of facilities used to provide the service"); OpenNet Coalition at 12-13 ("the broadband services at issue here must be defined in the same way whether provided over a copper telephone wire or a coaxial cable wire;" it is the "type of service," not who happens to provide it, that is "determinative"); Ascent at 4 ("And as the Commission has declared, it is the mandate of Congress that the 'classification of a provider should not depend on the type of facilities used.'").

These conclusions were then, and are now, correct.

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[2] Comments of EarthLink, Inc., *Inquiry Concerning High-Speed Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, at 2 (FCC filed Dec. 1, 2000)("*EarthLink Cable Comments*").
[3] *Id.* at 46.
[4] *Id.* at 48.
[5] *Id.* at 57.
[6] *Id.*

### B. The Constitution Does Not Permit the Commission to Play First Amendment Favorites.

Contrary to EarthLink's more recent arguments, the First Amendment prevents the Commission from regulating the use of and access to broadband Internet access provided by wireline companies while leaving the cable companies unregulated.

As an initial matter, there can be no serious dispute that any Commission regulation in this area would implicate the First Amendment. Just like any other ISP, including the ISPs affiliated with cable providers, when acting as an ISP BellSouth engages in expressive activities that fall within the First Amendment's protections. As the Supreme Court has explained, the provision of "original programming" or the "exercise of editorial discretion" triggers First Amendment protection.[7] When acting as an ISP, BellSouth engages in both those activities. BellSouth, like any other ISP, normally transmits its own content to its end users – a paradigmatic First Amendment activity. For instance, like other ISPs, BellSouth provides games, news groups, and other content exclusively to subscribers to BellSouth's retail high-speed Internet access service (FastAccess). Moreover, BellSouth engages in myriad additional editing functions – such as the caching of preferred content, and the aggregation and distribution of content – that also fall squarely within the scope of protected First Amendment expression. Such expressive activity by an ISP requires First Amendment protection.[8]

Moreover, under other applicable precedent, regulations that require forced access to the facilities through which an ISP provides content diminish the ISP's ability to speak and its editorial control.[9] Such regulations are subject to heightened First Amendment scrutiny.[10] In applying such heightened scrutiny, the Supreme Court has made plain that a

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[7] *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"); *see also Reno v. ACLU*, 521 U.S. 844, 863 (1997) ("the Internet – as the most participatory form of mass speech yet developed – is entitled to the highest protection from governmental intrusion") (citation and internal quotation marks omitted).

[8] *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 685, 690-692 (S.D. Fla. 2000).

[9] *Turner I*, 512 U.S. at 636-37.

[10] *Id.* at 640-41; *Minneapolis Star & Tribune Publ'g Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 580, 582 (1983) (applying heightened scrutiny to restriction "singl[ing] out the press for special [*i.e.*, disfavored] treatment," even in absence of evidence of "any impermissible or censorial motive on the part of the legislature"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232-33 (1987) (holding unconstitutional provision conferring tax exemption upon religious, professional, trade, and sports journals, but not general interest magazines); *Minneapolis Star*, 460 U.S. at 585 (holding unconstitutional use tax applicable only to large newspapers); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793-94 (1978) (holding unconstitutional restriction applicable to campaign activities of corporations, but not applicable to other entities); *Grosjean v. American Press Co.*, 297 U.S. 233, 251 (1936) (holding unconstitutional sales tax affecting only newspapers with high weekly circulations); *see also Broward County*, 124 F. Supp. 2d at 693 ("The imposition of an equal access provision . . . distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and economic approaches based upon the inherent advantages and disadvantages of their respective technology."); *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800, 810-14 (D.C. Cir. 1988).

crucial factor is whether the government's regulation is *underinclusive* -- that is, whether the government actor has failed to regulate similarly situated parties whose activities would also implicate the same allegedly substantial government interest. Simply put, it is difficult to conclude that a government interest is sufficiently substantial to survive heightened scrutiny where the government's regulation "leaves appreciable damage to [its] supposedly vital interest unprohibited."[11] In other words, as the Supreme Court has explained, "[e]xemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place."[12]

Accordingly, time and again the Supreme Court has invalidated restrictions on expressive activity where differential treatment prevented the restriction from accomplishing its stated goal. Thus, a ban on news racks containing commercial handbills allegedly intended to improve aesthetics could not survive review where the law did not impose a similar restriction on racks containing newspapers.[13] Similarly, a tax exemption allegedly intended to encourage fledging publications could not be justified where it did not apply to publications covering specific topics.[14] And a law allegedly intended to protect the privacy of a victim of sexual assault could not survive where it applied only to some means of communication.[15] Many other cases are to the same effect.[16] In sum, Supreme Court precedent "reflect[s] extraordinary concern for any underinclusiveness where speech is at stake."[17]

The same principles would invalidate any Commission attempt to require wireline companies, but not cable companies, to allow other parties to provide ISP services over their lines. EarthLink and others have contended chiefly that such regulation is justified by the supposed need to ensure consumer access to unaffiliated ISPs.[18] But if the

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[11] *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring); *see also id.* at 540 ("[w]here important First Amendment interests are at stake . . . [a selective ban] simply cannot be defended on the ground that partial prohibitions may effect partial relief").

[12] *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

[13] *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

[14] *Arkansas Writers' Project*, 481 U.S. at 232.

[15] *Florida Star*, 491 U.S. at 540-41.

[16] *E.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-05 (1979) (statute punishing newspaper disclosure of identity of juvenile offender, but allowing disclosure through other media, did not accomplish stated purpose of preserving juvenile's anonymity); *id.* at 110 (Rehnquist, J., concurring) (asserted interest not furthered sufficiently "when [restriction] permits other, equally, if not more, effective means" of accomplishing same end); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (law prohibiting disclosure of alcoholic strength on beer labels, but not in advertising, prevented material advancement of asserted interest in so-called alcoholic-beverage "strength wars").

[17] *News Am.*, 844 F.2d at 811.

[18] Indeed, EarthLink and the ITAA actually rely upon the disparate treatment accorded cable as justification for the need to continue forced access regulations on the telcos. *See Ex Parte* Letter from Kenneth R. Boley, Counsel for EarthLink, Inc., to Marlene Dortch, Secretary, FCC (Mar. 26, 2003) ("March 26 *ex parte*") ("Maintaining Computer III access principles on BOCs would be reasonable because ISPs generally do not have access to the cable platform."); *ITAA ex parte* at 9 ("The fact that cable system operators are

Commission were remotely serious about furthering that goal, it makes no sense to regulate wireline companies – with less than a third of the market, and a demonstrated history of providing access to multiple unaffiliated ISPs – while not regulating the dominant cable providers – with approximately 70% of the market and a history of fighting tooth-and-nail to keep unaffiliated ISPs off their systems.[19] Likewise, if the Commission is concerned about the possibility of cross-subsidization, it makes no sense to regulate wireline companies – which have been under price caps for years – while leaving the cable operators – whose cable television rates remain largely unregulated – free to do as they please.[20] And if the Commission is concerned about the prospects for competition in the core voice and video markets, it makes no sense to regulate the providers who are already subject to extraordinarily expansive market-opening obligations, while taking a hands-off approach to the providers who control a similar share of their core market yet face no such obligations.[21]

With regard to each of these rationalizations, the exemption of the cable operators would swallow the rule, leaving the Commission with a hopelessly "diminish[ed] . . . rationale for restricting speech in the first place."[22] As in all the prior cases we have discussed, the fact that the Commission's decision would "leave[] appreciable damage" -- indeed, by far the most significant source of damage -- "to [its] supposedly vital interest unprohibited" would be fatal to any attempt to require the forced surrender of the First Amendment rights of wireline companies, while preserving the interests of cable broadband providers in those very same rights.[23]

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not legally obligated to provide unbundled broadband transmission service on request . . . makes it more important to ensure that the ILECs continue to fulfill their statutory obligations as common carriers ...").

[19] *See, e.g.*, G. Campbell, *et al.*, Merrill Lynch, *Broadband Handbook: North American DSL & Cable Data Services in a Global Context* at 47 (Feb. 21, 2003) (estimating that cable serves more than 11 million residential broadband subscribers, or 69.2% of total subscribers).

[20] *See California v. FCC*, 39 F.3d 919, 926 (9th Cir. 1994) (under price caps, "a BOC would have little incentive to shift costs from nonregulated activities to regulated ones because it would not be able to increase regulated rates to recapture those costs"), *cert. denied*, 514 U.S. 1050 (1995); *see also, e.g.*, Letter from Senator John McCain, to Michael Powell, Chairman, FCC (Apr. 16, 2002) ("I am deeply concerned about the continued escalation of cable rates. . . .[Consumers] continue to endure rate increases that outstrip, by many multitudes, the price increases of other consumer goods and services.").

[21] *See* 47 U.S.C. § 251(c)(3); FCC Press Release, *FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers* (Feb. 20, 2003); *see also* UNE Fact Report 2002, at Figure 1-4, attached to BellSouth Comments, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (FCC filed Apr. 5, 2002) (showing overall CLEC penetration nationwide in the range of 16 to 20 percent of all access lines); Ninth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901, 26903, ¶ 7 (2002) (estimating that cable serves approximately 80% of MVPD).

[22] *City of Ladue*, 512 U.S. at 52.

[23] *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring).

### C. As EarthLink Has Previously Advocated, the 1996 Act, this Commission's Decisions, and Judicial Precedent Also Require That the Commission Treat Like Services Alike.

Constitutional issues aside, the 1996 Act,[24] this Commission's decisions, and consistent judicial precedent preclude the Commission from imposing broadband access requirements on telcos but not cable providers. Although EarthLink now purports to take issue with that conclusion, its arguments miss the point and in fact are directly contrary to EarthLink's own prior statements establishing that the Commission must treat like services alike. As EarthLink previously stated, the key point here is that the "regulatory classifications" in the 1996 Act are "based solely upon the nature of the service, not who provides it or how."[25] EarthLink further declared that the notion that the Commission should "treat cable differently because it is cable" is "*completely at odds with every applicable legal authority and must be rejected.*"[26] EarthLink's prior understanding of the law is correct, and EarthLink's opportunistic change of position – after the Commission has rejected heavy-handed regulation of cable broadband – should be flatly rejected.

The core question here is whether the Commission must adopt a regulatory regime that treats like services alike – or, put differently, whether the Commission must follow a *functional* approach that creates regulatory distinctions based solely on substantive differences, not the fact that the services rely upon different technologies. Significantly in this regard, in its March 24 *ex parte*, EarthLink does not suggest that there are any relevant substantive distinctions that would argue in favor of deregulating the market-leading cable providers while maintaining intrusive regulation of secondary wireline broadband providers. Indeed, as BellSouth and others have demonstrated in prior filings, there are no such distinctions that could justify such an upside-down regulatory regime in which only the secondary providers are subject to access obligations.

That fact is crucial here because, contrary to EarthLink's more recent arguments, the Commission *does* have an obligation to adopt a functional approach that treats like services the same. Indeed, the 1996 Act itself is based on functional categories. Cable systems generally cannot be regulated under Title II.[27] But they *do* fall under Title II when they provide a *telecommunications* service.[28] Telephone companies have

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[24] Telecommunications Act of 1996, Pub. L. 104-104, Title VII, 110 Stat. 153 (Feb. 8, 1996) ("1996 Act").

[25] *Earthlink Cable Comments* at 45.

[26] *Id*

[27] *See* 47 U.S.C. § 541(c).

[28] *Id.* § 541(b)(3) (exempting cable systems from cable franchise requirements when providing telecommunications services); *id.* § 541(d)(1) (FCC and states may require cable systems to tariff services that would be subject to regulation "if offered by a common carrier subject . . . to [Title II]"); *see also* H.R. Rep. No. 98-934, at 43 (1984) ("1984 Cable Act") ("[The] distinction between cable services and other services offered over cable systems is based upon the nature of the service provided, not upon a technological evaluation of the two-way transmission capabilities of cable systems.").

traditionally provided carriage under Title II, but they are Title VI cable operators insofar as they use their facilities (copper, coax, or any other) to provide a "cable service" instead.[29]

Of particular relevance here, Congress has made plain that it does not make technological distinctions in the area of broadband services. Section 706 of the 1996 Act thus directs the Commission to "encourag[e]" the deployment of "advanced telecommunications capability" generally, not to favor any particular technology used to deliver that capability. Driving home this point, Congress defined "advanced telecommunications capability" not in terms of a specific technology or platform, but rather as "high-speed, switched, broadband telecommunications capability" "*without regard to any transmission media or technology.*" 47 U.S.C. §157 note (emphasis added). Ironically, if Congress had enacted the provision that EarthLink cites in the 1995 Senate bill – which would have required the Commission to account for, among other things, "the unique and disparate histories" of different providers – that arguably would have required the Commission to take a step back from this established requirement of following a functional approach. Congress rejected that approach.

Consistent with Congress's insistence on a functional approach to communications regulation (and deregulation), the Commission has recognized that its rules implementing the Communications Act "should treat similar services consistently."[30] And the Commission has repeatedly stressed that the 1996 Act in particular is "technologically neutral."[31] Indeed, in this very context, the Commission has already explained that the statutory definitions in the 1996 Act – and the regulatory consequences that flow from those definitions – rest not "on the particular types of facilities used" but rather "on the function that is made available."[32] In this same vein, the Commission announced certain principles that would guide its decision-making in this proceeding that reinforce a function-over-facilities approach. "[B]roadband services should exist in a minimal regulatory environment that promotes investment and

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[29] 47 U.S.C. §§ 522(7)(a), 571(a)(3).

[30] Report and Order, *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 12 FCC Rcd 15668, 15692, ¶ 35 (1997).

[31] *See* Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 386, ¶ 2 (1999) ("*Advanced Services Order on Remand*"); Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24017-18, ¶ 11 (1998); *see also* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11548, ¶ 98 (1998) ("*Report to Congress*") ("We are mindful that, in order to promote equity and efficiency, we should avoid creating regulatory distinctions based purely on technology."); *see generally* Barbara Esbin, Office of Plans and Policy, FCC, OPP Working Paper No. 30, *Internet Over Cable: Defining the Future in Terms of the Past*, at 96 (Aug. 1998) (noting the "fundamental communications policy goal[]" of "competitive and technological neutrality").

[32] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4821, ¶ 35 (2002) ("Cable Modem Declaratory Ruling").

innovation in a competitive market."[33] "[T]he Commission will strive to develop an analytical framework that is consistent, to the extent possible, across multiple platforms."[34]

Moreover, when the Commission has failed to follow a functional approach, the federal courts have reversed its determinations. Thus, when the Commission decided that, regardless of the nature of the particular service at issue, anything offered by a service provider primarily in the business of common carriage *is* "common carriage," the D.C. Circuit overturned that decision, noting that "[w]hether an entity in a given case is to be considered a common carrier" turns "on the *particular practice* under surveillance."[35]

More recently, in this very context, when the Commission imposed line sharing on wireline carriers after engaging in an analysis that looked only at a particular technology (wireline broadband) to the exclusion of other platforms that provided the same functionality (including cable modem), the D.C. Circuit vacated its decision as "quite unreasonable" and based on a "naked disregard for the competitive context." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003) ("*USTA*"). And the Sixth Circuit similarly reversed the Commission's differential treatment of cellular and PCS precisely because those services were functionally analogous.[36] In this regard, contrary to EarthLink's suggestion, the Sixth Circuit ultimately affirmed the Commission's judgment in that proceeding only when the Commission changed course and decided to apply the same rules to LEC provision of cellular and PCS.[37]

Nor do the decisions that EarthLink has cited in its March 24 *ex parte* establish the dubious proposition that the Commission can treat like services differently solely because they rely upon different technologies. For instance, although EarthLink cites the *AT&T/McCaw* proceeding as an instance where the Commission rejected "parity for parity's sake," the question there was whether the Commission should apply MFJ-like restrictions to AT&T, a party that did not have the same alleged "bottleneck" control as

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[33] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, 17 FCC Rcd 3019, 3022, ¶ 5 (2002) ("*Wireline Broadband NPRM*").

[34] *Id.* at 3023, ¶ 6.

[35] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (emphasis added); *see also National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) ("*NARUC I*") ("[a] particular system is a common carrier by virtue of its functions"), *cert. denied*, 425 U.S. 992 (1976); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*") ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.")

[36] *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

[37] *See GTE Midwest v. FCC*, 233 F.3d 341 (6th Cir. 2000).

the BOCs. The Commission thus rejected that proposal because, among other things, the substantive rationale of bottleneck control did "not apply to *AT&T/McCaw*."[38]

In the D.C. Circuit's 1974 *Hawaiian Telephone* case,[39] the Commission had tried to "equaliz[e] competition" by awarding certain licenses to particular competitors but had never explained why that particular regulatory strategy accorded with the public interest; the Court simply remanded the matter to the Commission for such an explanation. That circumstance bears no resemblance to the present case, where, among other things, the D.C. Circuit has already reversed the Commission in *USTA* for improperly disregarding the full competitive context in broadband, including both wireline and cable technologies, and, moreover, where the issue is not taking affirmative steps to "equalize competition" artificially, but removing regulatory barriers that hamstring some but not all competitors.

In sum, there is no basis in law or logic that would permit the Commission to continue to regulate telco-provided broadband Internet access more extensively than cable-provided service. EarthLink had it right the first time: the notion that the Commission can "treat cable differently because it is cable" is unlawful and should be rejected.

## II. CONTRARY TO EARTHLINK'S CLAIMS, MARKET FORCES WILL LEAD TO ECONOMICALLY RATIONAL CONTRACTUAL RELATIONSHIPS BETWEEN ISPs AND BROADBAND PROVIDERS.

Scattered throughout its comments in the *Wireline Broadband Proceeding* are EarthLink's dire predictions concerning what may happen to consumer choice in the broadband market if there is a relaxation of ILEC regulation – e.g., "[D]eregulating wholesale DSL would put an abrupt end to broadband competition in this country"[40]; "[T]he elimination of common carrier DSL services would threaten the end of service to hundreds of thousands of EarthLink's end-users".[41]

Contrary to EarthLink's claims, the sky will not fall if the Commission eliminates Computer II/III and Title II regulation of wireline broadband services. Both the retail high-speed Internet access market, as well as any separate wholesale market for Internet transmission services (to the extent such a separate market can properly be said to exist), is subject to pervasive competition.[42] Indeed, the FCC has previously recognized the

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[38] Memorandum Opinion and Order, *Applications of Craig O. McCaw and AT&T Co.*, 9 FCC Rcd 5836, 5858, ¶ 32 (1994).

[39] *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974).

[40] *Comments of EarthLink, Inc.*, Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *CC Docket No. 02-33, et al., at 4 (FCC filed May 3, 2002) ("EarthLink Comments").*

[41] Id. *at 22.* Indeed, EarthLink actually proposes that *more* regulation be heaped onto the existing pile (*see* EarthLink Comments at 28-30), regulation that is entirely at odds with existing competitive market realities.

[42] Given the indisputable fact that the market for retail high-speed Internet access services is subject to pervasive competition, the Commission should remove all *Computer II/III* and Title II regulation from the

multiple types of transmission facilities that are currently available for Internet access to the home, including new and exciting alternatives that are on the immediate horizon.[43]

### A. EarthLink Relies Heavily on Competitive Transmission Services.

A review of EarthLink's comments in this proceeding would lead one to the mistaken conclusion that EarthLink relies exclusively, or almost exclusively, on the tariffed DSL transmission provided by ILECs to serve its end-user customers – "incumbent LECs have a continuing obligation to offer wholesale DSL on a common carrier basis, because they are the dominant providers and there is no significant competition or alternative competitive sources upon which ISPs can rely for wholesale broadband transport."[44]

EarthLink's assertions are belied, however, by its very own business arrangements with BellSouth, as well as its dealings with numerous other competitive providers of high-speed data transmission services. In order to comply with existing Commission regulations, BellSouth has made available a federally tariffed broadband service offering to EarthLink and other ISPs for several years. Earthlink has chosen not to utilize this tariffed offering, preferring instead to reach broadband subscribers in BellSouth's region through other more innovative methods. Some time ago, EarthLink approached BellSouth about purchasing a broadband service. EarthLink informed BellSouth that it was not interested in purchasing the tariffed offering, which EarthLink regarded as cumbersome, inefficient and not competitive with other alternatives. In response, BellSouth invested considerable time (approximately two years) and effort in developing an innovative service offering tailored to meet EarthLink's needs in order to win business that would otherwise have gone elsewhere.

The product that BellSouth developed combines the federally tariffed transmission with regional traffic aggregation and protocol conversion to create a simplified, economically efficient information service that meets EarthLink's needs. This service, called "RBAN" for regional broadband aggregation network, goes well beyond regulatory access requirements and was created because of market incentives. BellSouth

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wholesale broadband transmission services that companies such as BellSouth are presently required to offer on a nondiscriminatory basis.

[43] Presently, there are four categories of participants in the broadband market: cable operators; wireline telephone companies such as BellSouth and Covad; satellite operators; and fixed wireless providers. *See, e.g.*, Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 17 FCC Rcd 2844, 2853-54, ¶ 16 (2002) ("*Third Section 706 Report*"). Power line communications and mobile wireless broadband services are expected to be widely deployed in the next several years. *See id.* at 2878, ¶ 80; Michael P. Bruno, *Online Access Planned Through Power Lines*, Washington Post, Jan. 25, 2002, at E5; *The FCC's Powell on Broadband Rules*, Business Week Online, Feb. 22, 2001.

[44] *EarthLink Comments* at 18 (internal quotation marks omitted).

recently signed an agreement to provide this service to Earthlink,[45] and has reached agreements to provide this service to other ISPs as well.

Thus, in this proceeding, EarthLink is insisting that the Commission maintain outdated regulatory regimes that require the ubiquitous availability of tariffed transmission that EarthLink did not in fact want to purchase! Indeed, EarthLink is insisting that this Commission maintain the *Computer II/III* and Title II requirements that substantially increased the time necessary to develop this innovative offering, and substantially increased the costs of providing it.[46] Apparently, EarthLink's primary interest in its almost daily barrage of *ex parte* presentations to the Commission is to maintain the regulatory status quo of imposing unnecessary costs on BellSouth and other ILEC-affiliated ISPs.

In addition to negotiating innovative commercial arrangements with independent ISPs such as EarthLink, BellSouth and other ILECs have also taken steps to make their tariffed transmission service offerings more competitive vis-à-vis cable and other alternative platforms. For instance, BellSouth recently filed an extension of its Spring Promotion that effectively provided a five-dollar ($5.00) per line reduction in the monthly recurring charge and a forty-dollar ($40.00) per line reduction in non-recurring charges for its tariffed wholesale DSL transmission service. These rate reductions were necessary to maintain BellSouth's position in the competitive market for broadband transmission services.

Similarly, in an attempt to increase its broadband business, Verizon has filed tariffs enabling independent ISPs to take advantage of much steeper discounts when qualifying for volume and term agreements.[47] These are not the actions of companies insulated from competitive pressures.

Further, in its recently filed 10-K/A, EarthLink reports having entered numerous alliances with competitive providers of high-speed data transmission, including Time Warner Cable, OmniSky wireless data, ATT Broadband (now Comcast), Go America Wireless Data, and SBC (the only ILEC mentioned), to name a few.[48] For example,

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[45] This new agreement between BellSouth and EarthLink was announced March 24, 2003 and expands the BellSouth facilities over which EarthLink can sell its high-speed services. Under this agreement, EarthLink will use BellSouth's broadband network to serve an additional 4.5 million households, expanding EarthLink's presence to seventy-nine (79) southeastern cities, up from fifteen (15) urban markets currently. *See* joint press release at http://www.earthlink.net/about/press/pr_bellsouthinternet/.

[46] *See* BellSouth April 1, 2003 ex parte.

[47] *See* TR Daily, Verizon Cuts Wholesale DSL Rates in Bid for Greater Market Share, Apr. 18, 2003; Ex Parte Letter from Susanne Gyer, Senior Vice President of Verizon, to Marlene Dortch, Secretary, FCC (May 19, 2003), p. 2.

[48] *See* EarthLink, Inc., SEC Form 10-K/A, at 20 (SEC filed Apr. 1, 2003) ("EarthLink Form 10-K/A"). The Commission specifically requested information regarding how entities "have used means other than those provided through the *Computer II/III* access requirements to acquire the transmission necessary to

EarthLink reports that as of June 30, 2002, it began utilizing the Time Warner Cable systems to provide its full package of high-speed Internet access, content, applications and functionality to all 39 markets served, including New York and Los Angeles. Similarly, EarthLink reports that it has recently started offering its high-speed Internet access services in the Seattle and Boston area markets by utilizing the AT&T Broadband (Comcast) cable network.[49]

While EarthLink may utilize Comcast's cable network in only two metropolitan areas, Comcast has other agreements with other independent ISPs covering other domestic markets:

> Comcast's third-party ISP arrangements are now operational in Seattle and Boston (EarthLink), as well as Indianapolis [and Nashville] (United Online); two of Comcast's existing agreements with regional ISPs are expected to become operational in the next sixty (60) days; and implementation of Comcast's third-party ISP agreement with AOL is scheduled to begin in four cities by July 31, 2003.[50]

Further, EarthLink does not specifically mention the use of BellSouth's transmission service in its 10-K/A filing. Indeed, EarthLink states that its "principal providers for narrowband telecommunications services are Level 3 and Sprint, and [EarthLink's] largest provider of broadband connectivity is Covad."[51] In its 10-K/A filing, EarthLink further states that it does "*lesser amounts of business* with a wide variety of local, regional and other national providers"[52] which would presumably include ILECs such as BellSouth.

Yet, in this proceeding, EarthLink states that "DLECs [such as Covad] do not amount to a substantial alternative ...."[53] Further, EarthLink claims that those commenters that support deregulation "fail to present facts regarding the degree of actual competition in the market and consumer availability of those potential platforms."[54] Still

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provide their information service offerings, including reliance on negotiated contractual arrangements." *Wireline Broadband NPRM*, 17 FCC Rcd at 3042, ¶ 50.

[49] Although EarthLink attempts to minimize the scope and importance of the access deals that it has reached with cable companies, the fact remains that is has reached deals with the two largest cable companies with broad domestic coverage. *See EarthLink Comments* at 27 ("EarthLink and some ISPs have managed to obtain access to broadband transmission over cable, but they are few in number. . . . ).

[50] CS Docket No. 02-52, Ex Parte Letter from Ryan G. Wallach, Counsel for Comcast Corporation, to Marlene Dortch, Secretary, FCC (May 7, 2003).

[51] EarthLink Form 10-K/A at 26-27. Covad touts its wholesale DSL transmission service in its recent March 21, 2003 ex parte filing in CC Docket No. 02-33 where it lists EarthLink as one of its many wholesale customers.

[52] EarthLink Form 10-K/A at 27 (emphasis added).

[53] April 29 *ex parte* at 5.

[54] Reply Comments of EarthLink, Inc., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, et al., at 13 (FCC filed July 1, 2002) ("EarthLink Reply Comments").

further, EarthLink claims that, "incumbent LECs are the dominant provider of wholesale transport to the market."[55] Interestingly, EarthLink does not disclose the actual percentage of its customer base served by non-ILEC provided transmission. Given the information contained in its 10-K/A, one is left to wonder whether EarthLink actually utilizes non-ILEC provided transmission to serve most, or at least a substantial portion, of its customer base.

Further, while EarthLink may suggest that its ability to rely upon Covad is tenuous at best given the questionable regulatory status of line sharing, such suggestions ignore Covad's recent steps to minimize its reliance upon that platform through use of unbundled copper loops and negotiated line splitting arrangements with other CLECs. Covad's CEO, Charles Hoffman recently stated, "We already have line-splitting trials underway with AT&T, with launch mere months away, and are working with other partners to expand voice and data offerings."[56] "We are confident that Covad's business plan can be adjusted if necessary to absorb the FCC's changes while allowing us to continue running a nationwide network."[57] Most recently, Covad has announced a similar partnership with Z-Tel.[58] Finally, Covad has expressed a desire to move away from further regulation in favor of privately negotiated commercial arrangements – "the market is really the best place for all that to work out, and if the FCC would get out of the way we could all just do deals together."[59]

In addition, EarthLink's discussion of its future plans and goals concerning broadband connectivity further reveals the competitive nature of the market and EarthLink's preference for new and innovative competitive offerings:

> Over time, it will be necessary to reduce broadband line charges from telecommunications and cable companies or utilize emerging alternative broadband access technologies with lower cost structures in order to achieve attractive margins on broadband services and to continue maintaining stable overall margins. Reducing line charges may be facilitated by gaining access to a larger number of cable systems over which EarthLink can offer its high-speed Internet services and creating more wholesale competition between telecommunications and cable companies for EarthLink's high-speed business.[60]

In this proceeding, BellSouth is simply requesting that the Commission finally eliminate the outdated and costly regulation that stand in the way of the reductions in broadband

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[55] *EarthLink Comments* at 18.
[56] J. Curran, *Covad in Talks on Line-Splitting With Competitive Voice Providers*, TR Daily (Mar. 12, 2003).
[57] *Id.*
[58] Z-Tel Technologies, Inc., Press Release, New Agreement with Covad Allows Z-Tel to Deliver Broadband Services to Its Telecom Customers (May 15, 2003).
[59] J. Curran, *Covad CEO: Line Sharing Portion of FCC Order May Be Softened*, TR Daily (May 7, 2003).
[60] April 29 *ex parte* at 5.

line charges that EarthLink claims are vital to its achieving and maintaining attractive margins for its end user services.

### B. Even Without a Regulatory Mandate, BellSouth Has and Will Continue To Provide DSL-Based Transmission Services to Independent ISPs Pursuant to Negotiated Agreements.

EarthLink further speculates that if companies such as BellSouth are not required to offer a wholesale DSL-based transmission service, they will ultimately refuse to do so as part of some scheme or artifice to force all broadband customers to purchase their own retail high-speed Internet access services – "[a]llowing carriers to withdraw their DSL offerings by avoiding either Title II, *Computer II*, or *Computer III* obligations would be the death knell for broadband competition in this country."[61]

Once again, EarthLink's expressed concerns ignore the competitive reality in this marketplace and the fact that cable, not wireline, is the dominant provider of broadband services. Given these competitive realities, it is not in the financial best interest of BellSouth or any other company to simply refuse to provide a competitive DSL transmission service to independent ISPs, given the fact that such ISPs can and would simply strike a deal with some other transmission provider and migrate their customer base to those competing facilities.[62] Further, as BellSouth has previously explained, the economics favor spreading the enormous cost of the network over as much traffic and as many customers as possible, regardless of whether such customers are wholesale or retail.[63]

Interestingly, EarthLink recognizes that cable companies are not required to offer their high-speed transmission services on a common carrier basis; nevertheless, EarthLink has successfully negotiated agreements with the most prominent of such companies.[64] Further, recent developments in the market place suggest that the cable industry is recognizing the business case for permitting network access.

Indeed, in addition to reaching agreements with the two largest cable companies in the nation, EarthLink has at least previously utilized the facilities of Charter Communications, the nation's third largest cable company.[65] Moreover, other cable companies have expressed a willingness to negotiate. For instance, Cox

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[61] *EarthLink Comments* at 27.
[62] *See BellSouth Comments* at 17.
[63] *Id.* at 22-23.
[64] *See* Ex Parte Letter from Earl W. Comstock, Counsel for EarthLink, Inc. to Marlene Dortch, Secretary, FCC (April 30, 2003) ("April 30 *ex parte*") ("[T]o date there have been no negotiated agreements for carriage of an unaffiliated ISP on a cable network (including the AOL/Time Warner agreement for carriage on the Comcast network) which have not occurred in the context of regulatory oversight of a merger proceeding.").
[65] *See* http://stocks.internetnews.com/close/article/0,1785,60851,00.html

Communications, the nation's fourth largest cable company, has conducted a technical multiple-ISP ("MISP") trial in El Dorado, Arkansas and recently stated that although the company has not yet signed any deals with ISPs for Cox's cable modem service, Cox had been actively seeking such a deal.[66] While it remains unknown whether EarthLink has or will attempt to negotiate access with Cox, it would appear that EarthLink has no incentive to pursue or enter any further agreements with cable companies during the pendency of this proceeding, because any such additional agreements would undermine the positions that it has taken herein.

More and more, cable companies are recognizing the financial potential of permitting ISP access to their networks. Consultant and former cable association president Stephen Effros has said: "As a business model, it would appear that the cable companies are finding that it might be useful to [grant MISP access], and therefore, they're doing it."[67] Similarly, a white paper prepared by RiverDelta Networks entitled "Eliminating Open Access Technology Barriers" concludes that "Open access, which was once looked at as a problem by MSOs, is increasingly viewed as an opportunity to accelerate subscriber growth, provide a richer and more complete set of value-added services, and establish revenue-sharing agreements with third-party providers."[68] RiverDelta Networks is developing next-generation technologies architected specifically to support open access that can provide the functionality required by cable companies seeking to embrace new open access opportunities.[69]

Moreover, in its *Cable Modem Declaratory Ruling*, the Commission expressly recognized the desire of cable companies to offer transmission services to independent ISPs, even though not required to do so, and relied upon such facts to support its conclusion not to require common carrier status for those transmission services.[70] The same market and financial realities that lead cable companies to strike agreements with independent ISPs apply with greater vigor to BellSouth, given cable's ever increasing lead in the marketplace.

Indeed, if EarthLink's views regarding BellSouth's incentives were correct, BellSouth would not have spent two years negotiating and developing a different commercial arrangement with EarthLink but, rather, would have offered EarthLink only the tariffed transmission that it was obligated to provide pursuant to the rates, terms and conditions contained in BellSouth's existing tariff.

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[66] "What's good for Bells may be good for cable," http://www.computeruser.com/news/03/03/02/news4.html

[67] *Id.*

[68] http://www.cabledatacomnews.com/whitepapers/paper07.html

[69] *Id.*

[70] *See Cable Modem Declaratory Ruling* at n. 123 ("AT&T has stated that [it has constructed a network that as] designed [will] enable multiple ISP service and that it is capable of doing so on a commercial basis once enhancements are added.").

BellSouth's ability to negotiate and enter such tailored agreements is frustrated immensely by the existing regulatory burdens of having to offer the underlying tariffed components immediately to any other requesting carrier anywhere in BellSouth's region at tariffed rates. Both speed to the marketplace and innovation of service offerings are suffering, and will continues to suffer, due to the existing regulatory regime. Indeed, the two years that it took to negotiate the RBAN agreement between EarthLink and BellSouth was due in large part to the existing morass of regulatory requirements. As BellSouth has previously pointed out, the lopsided application of regulation to the non-dominant provider of competitive transmission services chills innovation and choice. If the Commission mandates regulation of one provider while allowing the other provider operational freedom, the Commission is essentially taking away from the ILEC the ability to compete in the same way that cable modem providers are addressing market demand.[71]

In sum, it is simply impossible to square EarthLink's comments in this proceeding with its receipt of innovative, voluntarily negotiated non-tariffed service offerings from BellSouth and its diverse use of numerous competitive alternatives. Contrary to EarthLink's assertions, there does exist a growing competitive marketplace for the provision of broadband transmission to independent ISPs. Within this marketplace, Covad, Comcast, Time Warner, SBC, Verizon, BellSouth and others all compete for their business. The existence of this competitive marketplace necessitates the FCC's reclassification of ILEC-provided DSL transmission services as private carriage and removal of all *Computer II/III* regulations of such services.

## III. ILEC-PROVIDED DSL TRANSMISSION SERVICES DO NOT MEET THE REQUIREMENTS FOR TITLE II COMMON CARRIAGE.

In light of the competition for wholesale transmission services as evidenced by EarthLink's own extensive use of such competitive alternatives, maintaining common carrier status of those services when provided by an ILEC is no longer warranted under the very precedent cited by EarthLink.

As EarthLink itself has explained recently, "[o]ne factor of the Commission's inquiry . . . is whether the provider has sufficient market power to warrant regulatory treatment as a common carrier, which can be measured by the existence or lack thereof of sufficient alternative facilities."[72] If anything, EarthLink has understated the centrality of market power in this analysis. This Commission has previously explained:

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[71] The Commission has previously recognized the benefits of contract, rather than common, carriage in competitive markets analogous to the market for high-speed transmission services: "'Contract carriage . . . increase[s] the ability of customers to negotiate service arrangements that best address their particular needs.'" Report and Order, *Revisions to Price Cap Rules for AT&T*, 10 FCC Rcd 3009, 3018-19, ¶ 27 (1995) (quoting Report and Order, *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5899 (1991)).

[72] *EarthLink Comments* at 17 (internal quotation marks omitted).

> [T]he presence of significant competition is an important factor in determining whether common carrier requirements should be imposed on satellite operators ... [because] if the barriers to entry for new satellite operators are low and alternative competitive sources of satellite services are available to consumers, satellite operators will have an incentive to offer service efficiently at low rates. In such an environment, the Commission has held that is not necessary to compel space station operators to offer their service indifferently to the public as a common carrier because competition will achieve the same result for purchasers of space segment capacity as regulation, that is, efficient service at low prices.

Notice of Proposed Rulemaking, *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 14 FCC Rcd 4843, 4876, ¶ 75 (1999) ("*MSS NPRM*") (citing Memorandum Opinion, Order, and Authorization, *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238, 1254-55, ¶ 39 (1982), *aff'd*, *World Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984), *modified*, Memorandum Opinion and Order, *Applications of Martin Marietta Communications Systems, Inc.*, File No. 952/953-DSS-P/LA-84 954-DSS-P-84, 1986 FCC LEXIS 3208 (1986)). *See also* Report and Order, *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 FCC Rcd 16127, 16172-73, ¶ 94 (2000) ("MSS Order") (quoted at EarthLink Comments at 18).

Just as there were alternative competitive sources of satellite services available to consumers ensuring that satellite operators have an incentive to offer service efficiently at low rates, so too are there other competitive alternatives to BellSouth's DSL transmission service that ISPs can utilize to provision service to their end-user customers. Consequently, common carrier status is no longer necessary or legally justifiable for such services.

In this regard, EarthLink is wrong in its new-found argument in its April 17 and 29, 2003 *ex partes* that the D.C. Circuit's decision in *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I"), uniquely requires that DSL transmission, but not cable modem, be offered as a common carrier transmission service. On the contrary, the Commission has expressly applied *NARUC I* in concluding that the key issue is whether a particular provider "has sufficient market power" "to warrant regulatory treatment as a common carrier."[73] And, of course, if market-leading cable modem providers do not

[73] Memorandum Opinion and Order, AT&T Submarine Systems, Inc., 13 FCC Rcd 21585, 215889, ¶ 9 (1998); Memorandum Opinion, Declaratory Ruling, and Order, *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS*, 102 F.C.C.2d 110, 120-22, ¶¶ 22-28 (1985); *see also* NARUC, 525 F.2d at 644 n.76 (noting that Commission may "impos[e] [upon a carrier] requirements which ... ma[ke] them common carriers"); *see generally* M. Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbone*, at 9 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation

have market power sufficient to mandate common carriage, it makes no sense to conclude that DSL providers have such power. EarthLink understood this point all too well in its prior advocacy in the *Cable Modem Proceeding*.

EarthLink's claim in its April 29 *ex parte* that these cable providers are not offering service in an alleged wholesale market to ISPs are beside the point (even if they are true, a fact that is subject to dispute as discussed above). EarthLink is simply wrong in asserting that because cable providers allegedly currently "do not make their transmission services available at wholesale to more than a few independent ISPs, and have thus far offered such services only on a limited basis, broadband transmission over cable cannot be expected to constrain the behavior of an incumbent LEC" in the supposed wholesale market.[74] EarthLink provides no support for this analysis, and it is flatly incorrect. In particular, as long as cable companies *could* easily enter the wholesale broadband market -- which EarthLink does not dispute – the ability to do so constrains the behavior of other providers in the market and the cable companies should be considered to participate in the relevant market. *See* U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, section 1.32, "Firms That Participate Through Supply Response."

Thus, as a basic text explains, "It is of little consequence that consumers" -- in the context of EarthLink's claim, ISPs -- "have no good substitutes if *producers* can immediately respond to a firm's price increase by switching production to the firm's products."[75] Stated in a different way, "whatever market definition is employed, relative ease of entry by other firms should always be taken into account. The one course that would clearly be wrong would be to define the market as A alone while ignoring the ease of entry from B producers."[76] The Supreme Court, other courts, and this Commission have thus all recognized the important fact that "cross-elasticity of supply" -- in this instance, the ability of cable providers to convert to the wholesale market -- can be "an important factor in market definition."[77] Thus, even if a potential entrant were currently devoting its capacity to a wholly different product -- which is not the case here -- it is part of the relevant market if it could readily switch to the product at issue (in this instance, wholesale broadband transport).[78] This analysis is particularly apt here because cable providers not only can provide wholesale broadband transport, but, as EarthLink

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"serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

[74] EarthLink April 29 *ex parte* at 8-9.

[75] Areeda, Hovenkamp & Solow, IIA *Antitrust Law* 255 (1995).

[76] *Id.* at 257.

[77] *United States v. Brown Shoe Co.*, 370 U.S. 294, 325 n.42 (1962); *Rothery Storage Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986); *Calnetics Corp. v. Volkswagen*, 532 F.2d 674, 691 (9th Cir. 1976); *Craig O. McCaw and AT&T Co.*, 9 FCC Rcd 5836 ¶¶ 13-14 (1994), *aff'd SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

[78] *E.,g., Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1367-68 (5th Cir. 1976) (ability of growers to switch to different kinds of flowers precludes a chrysanthemum-only market).

acknowledges, do so in at least some circumstances. For this independent reason, EarthLink is also incorrect.

Similarly, EarthLink is incorrect in asserting that the fact that ILECs, but not cable providers, have been previously compelled to provide broadband transmission pursuant to Title II common carrier requirements can in and of itself justify the same continued treatment into the foreseeable future.[79] Given the previous regulatory compulsion, ILECs cannot be deemed to have willingly chosen to provide broadband transmission on a common carrier basis.[80] Any reliance upon past common carrier provisioning of DSL transmission as the basis for a continuing obligation simply begs the question – whether the prior regulatory compulsion should continue in light of the numerous competitive broadband choices that are now available to consumers and given the hands-off approach that the Commission has taken with respect to the competing services of the dominant provider, cable.

Finally, the Commission requested comment whether and to what extent the issues pending in the captioned proceeding would depend upon the outcome of the *Incumbent LEC Broadband Notice*.[81] In order to achieve a consistent and uniform regulatory policy for wireline broadband Internet access services, the Commission's decision in the *Incumbent LEC Broadband Notice* that ILECs are non-dominant for purposes of the broadband market would logically necessitate the further conclusion that ILECs do not possess sufficient power in any defined wholesale high-speed Internet access transmission market to warrant regulatory treatment as common carriers.

## IV. CONTRARY TO EARTHLINK'S CLAIMS, ILECS ARE STILL FAR BEHIND CABLE IN THE PROVISIONING OF RETAIL HIGH-SPEED INTERNET ACCESS SERVICES.

EarthLink argues that subscribers to ILEC-provided wireline Internet access services are increasing at a rate much greater than subscribers to cable-modem based services.[82] In support of this claim, EarthLink selects stale data contained in an FCC report detailing the growth "from Dec. 2000 to June 2001 for residential and business

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[79] *See* April 29 *ex parte*. Ex Parte Letter from Mark J. O'Connor, Counsel for EarthLink, Inc., to Marlene Dortch, Secretary, FCC (April 29, 2003) ("April 29 *ex parte*").

[80] *See BellSouth Comments* at 14 (citing *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994); *Computer and Communications Indus. Ass'n v. FCC*, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[81] *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 16 FCC Rcd 22745 (rel. Dec. 20, 2001) (*Incumbent LEC Broadband Notice*). *See Wireline Broadband NPRM*, 17 FCC Rcd at 3034-35, ¶ 28.

[82] *EarthLink Comments* at 21("Comparing incumbent LEC ADSL residential and business line growth rates with those of cable, the FCC's data also shows that the incumbent LEC's growth significantly exceeds that of cable.").

advanced services,"[83] rather that the most recent data issued by the Commission that shows a very different picture.

On December 17, 2002, the Commission released data on high-speed services for Internet access for the first half of 2002, that provides in relevant part:

- High-speed asymmetric DSL ("ADSL") lines in service increased by 29% during the first half of 2002, from 3.9 million to 5.1 million lines, compared to a 47% increase, from nearly 2.7 million to 3.9 million lines, during the preceding six months.

- High-speed service over coaxial cable systems (cable modem service) increased by 30% during the first six months of 2002, from 7.1 million to 9.2 million lines. By comparison, cable modem service increased by 36%, from nearly 5.2 million to 7.1 million lines, during the second half of 2001.

These most recent figures show that the rate of ADSL subscriber growth has slowed, while cable's already larger customer base continues to grow at a more constant rate.

Other reports confirm the fact that cable is extending its lead. An April 21, 2003 article on BusinessWeek online cites a report by the research firm Strategy Analytics that at the end of 2002, "just 6.2 million of the 18 million broadband households in the U.S. were using DSL [and that] Strategy Analytics . . . *predicts that the gap will widen* as cable outfits bundle high-speed Internet and TV service in compelling, consumer-oriented sales packages."[84] A March 13, 2003 article in the Wall Street Journal, entitled "How Phone Firms Lost to Cable In Consumer Broadband Battle," states: "Today, high-speed consumer access to the Internet, known as broadband, is a surging business. But a different industry, cable television, has nearly 70% of it, according to Merrill Lynch & Co. Few observers expect that the phone companies' version – called DSL . . . –can ever catch up."[85] TR's Online Census issued for the First Quarter 2003 entitled "Online Audience at 76.6 Million, Up 1.6% in First Quarter; Cable Modems Outpace DSL Growth, As AOL, MSN, and Other Dial-ups Drop," reports that cable modem providers showed the biggest growth in the broadband sector adding 1,390,205 users (13.4%) during the quarter, compared to digital subscriber line growth of 640,049 customers, up 9.14%.

Further, EarthLink claims that ILECs such as BellSouth will continue to invest in broadband deployment even in the face of the continuing disparate regulatory treatment accorded their investments and services. Although BellSouth will continue to make those

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[83] *Id.* at 21 n.54.

[84] Saving the Bells' Broadband Bacon, Business Week Online, Apr. 21, 2003 (emphasis added), at http://www.businessweek.com/technology/content/apr2003/tc20030421_9461_tc024.htm.

[85] http://online.wsj.com/article_print/0,,SB1047520939966200000,00.html.

broadband investments where there exists a firm business case for doing so, BellSouth and other ILECs cannot, in the face of such regulatory uncertainty, continue with the same vigorous broadband investment programs that have marked prior years. Existing regulatory uncertainty with regard to broadband services at both the federal *and state* levels renders it difficult, if not impossible, to determine whether further investments should be made. For instance, certain types of investments, such as the installation of dual-purpose line cards in remote terminals that would have the effect of expanding the availability of DSL-based services, have been delayed due to the uncertainty regarding the regulatory implications of making such investments.

Within this great chasm, there is one certainty – for the foreseeable future, the cable-modem footprint and subscriber base will continue to eclipse that of DSL-based services.[86]

## VI. CONCLUSION

For all of the reasons expressed herein, as well as those expressed in its earlier comments and *ex parte* presentations, BellSouth respectfully requests that the Commission reaffirm its prior consistent practice of according functionally equivalent services regulatory parity, irrespective of the facilities used or technologies employed to provide them, and remove all *Computer Inquiry* and Title II regulations from ILEC-provided broadband Internet access services and their underlying transmission.

Sincerely,

Jonathan B. Banks

cc: Christopher Libertelli
Matthew Brill
Dan Gonzalez
Lisa Zaina
Jessica Rosenworcel
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[86] Cable World, Kagan on Cable , pp. 10-11 (Spring-Summer 2003) ("We still estimate that cable will maintain 70% of the data market through 2012).

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