

July 31, 2003

EX PARTE

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

Re: Ex Parte Presentation, CS Docket No. 02-52 and CC Docket 02-33

Dear Ms. Dortch:

On July 30, 2003, Dave Baker, Vice President of Law and Public Policy for EarthLink, and Earl Comstock of Sher & Blackwell met with Stacy Robinson of Commissioner Abernathy's office to discuss the pending decision by the U.S. Court of Appeals for the Ninth Circuit in *Brand X Internet Service v. FCC* (Docket No. 02-70518, 9th Cir. 2002) and the impact of that decision on the Commission's tentative conclusion in its Notice of Proposed Rulemaking (NPRM) in CS Docket 02-52 with respect to forbearance from applying title II regulation to the transmission component of cable modem service. Mr. Baker and Mr. Comstock provided Ms. Robinson with the attached memorandum that discusses in detail the legal inadequacy of the Commission's forbearance analysis in the NPRM.

In addition to discussing briefly the key points made in the memorandum, Mr. Baker, Mr. Comstock, and Ms. Robinson also discussed the likely probability that any Commission order arising out of the NPRM would be released in conjunction with an order in the Wireline Broadband proceeding (WB Docket 02-33). Finally, Mr. Comstock pointed out that if the court in the *Brand X* case rules that as a matter of law the transmission component of a cable based broadband Internet access service is a telecommunications service, then that ruling would affect the Commission's analysis in the Wireline Broadband proceeding (WB Docket 02-33) because the court's determination would apply equally to the transmission component of a wireline based broadband Internet access service.

If you have any questions regarding this notice or the attached memorandum please contact the undersigned at 202-463-2514.

Sincerely,



Earl W. Comstock
Counsel for EarthLink, Inc.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

CS Docket No. 02-52

Appropriate Regulatory Treatment of Broadband
Access to the Internet Over Cable Facilities

**Presentation of EarthLink, Inc. In Opposition to
Proposed Forbearance From Applying Title II of the
Communications Act to Facility-Based
Transmission Underlying Cable-Based Internet
Access Services**

July 30, 2003

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EXECUTIVE SUMMARY

Currently before the Ninth Circuit Court of Appeals is the issue of what the proper classification is for the transmission component of cable-based Internet access service. To the extent that the Court of Appeals determines that the transmission component of cable modem service is properly classified as a “telecommunications service,” the Commission has already proposed in its *NPRM* to attempt to negate such a ruling by exercising its forbearance authority under section 10 of the Communications Act (the “Act”) to relieve cable companies of any common carrier obligations under Title II of the Act.

More specifically, the Commission has proposed to forbear from enforcing sections 201 and 202 of the Act, which require common carriers to provide telecommunications services upon reasonable request and on non-discriminatory and reasonable terms. Most relevant to this proceeding, those statutory sections mandate that cable companies that use their own transmission facilities to deliver high speed Internet access to the public must sell the underlying transmission services to unaffiliated Internet service providers (ISPs) and the public.

The Commission has repeatedly held that sections 201 and 202 form the “bedrock” of consumer protection under Title II. Because these provisions are so fundamental, the Commission has never relieved any common carrier from compliance with these provisions. The Commission should not – and legally may not – do so here.

The statutory test for forbearance under section 10(a) of the Act has three prongs, each of which must be satisfied before the Commission may forbear from enforcing a regulation or provision of the Communications Act.

In light of these statutory requirements, the four rationales the Commission provides in its *NPRM* as to why it should forbear from all

Title II regulation are entirely inadequate. First, the Commission posits that forbearance is necessary to achieve uniform national treatment of cable modem service as an information service. However, if the Ninth Circuit finds that cable modem service contains a telecommunications service, then every cable modem service nationwide contains a telecommunications service. Accordingly, the Commission's intentions with respect to regulation of information services become irrelevant.

The other three reasons given by the Commission in the *NPRM* for why forbearance from Title II requirements for cable modem service would be justified are that "cable modem service is in its early stages; supply and demand are still evolving; and several networks providing residential high-speed Internet access are still developing." In fact, cable modem service is not in "in its early stages;" it has been offered to the public for over seven years, and is presently being provided to millions of users nationwide. Likewise, "supply and demand" are not "still evolving;" the industry currently has far more supply than demand, and that demand is experiencing rapid and predictable growth. Finally, the last assertion, that "several residential networks are still evolving," even if true, would simply highlight the fact that competition in the provision of high speed Internet access service is still limited.

In summary, the Commission may not forbear from applying, at a minimum, sections 201 and 202 of the Act to the common carrier transmission service used to provide cable-based internet access services to the public.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

CS Docket No. 02-52

Appropriate Regulatory Treatment of Broadband
Access to the Internet Over Cable Facilities

**Presentation of EarthLink, Inc. In Opposition to Proposed
Forbearance From Applying Title II of the Communications Act to
Facility-Based Transmission Underlying Cable-Based Internet Access
Services**

July 30, 2003

This document provides a summary of EarthLink's position regarding the Commission's authority to lawfully forbear from Title II regulation in the event that the U.S. Court of Appeals for the Ninth Circuit holds that the transmission component of "cable modem service" is a "telecommunications service."

Introduction

The Federal Communications Commission determined in its March 15, 2002, *Declaratory Ruling* that "cable modem service is not itself and does not include an offering of telecommunications service to subscribers."¹ The Commission instead classified cable modem service,

¹ *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling*, CS Docket No. 02-52, Aug. 6, 2002, ¶¶ 1-71, at ¶ 39 (hereinafter "Declaratory Ruling").

as it is currently offered, as an “information service.”² In its 2002 *Declaratory Ruling*, the Commission referenced the 2000 court decision in *AT&T v. City of Portland*, in which the Ninth Circuit Court of Appeals classified cable modem service differently, holding that when a cable operator offers an Internet access service over its cable facilities, it is actually providing two services: an unregulated “information service” and a regulated “telecommunications service.”³ This exact issue is again before the Ninth Circuit Court of Appeals in *Brand X Internet Services v. FCC*.⁴ The case has been briefed, argued, and submitted for decision, and EarthLink expects that the Ninth Circuit will follow its *Portland* decision and properly classify the transmission component of cable-based Internet access service as a “telecommunications service.”

To the extent that the Court of Appeals for the Ninth Circuit may determine that the transmission component of cable modem service is properly classified as a telecommunications service, the Commission has already proposed in its *Notice of Proposed Rulemaking (NPRM)*⁵ that it would attempt to negate such a ruling by the Ninth Circuit (and presumably any other court) by utilizing its forbearance authority under section 10 of the Communications Act of 1934.⁶ Section 10 authorizes the Commission, in certain instances, to “forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or

² *Id.* at ¶ 7.

³ *AT&T v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

⁴ *Brand X Internet Service v. FCC*, Dkt. No. 02-70518 (9th Cir. 2002).

⁵ *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Notice of Proposed Rulemaking*, CS Docket No. 02-52, Aug. 6, 2002, ¶¶ 72-112 (hereinafter “NPRM”).

⁶ *Id.* at ¶ 95. Section 10 of the Communications Act of 1934 (“the Act”) can be found at 47 U.S.C § 160.

telecommunications services.”⁷ In the *NPRM*, the Commission has tentatively concluded that it would be justified in forbearing from applying all Title II requirements and common carrier regulation that would otherwise be applicable to that portion of cable modem service that is found by the court to be a telecommunications service.⁸

EarthLink has addressed the issue of forbearance in its Comments and Reply Comments in the *Notice of Inquiry*⁹ that preceded the *NPRM*, as well as its Comments and Reply Comments in this proceeding.¹⁰ In light of the fact that the *Brand X* case is ripe for decision, and because it has been some time since the Commission’s record has been updated, EarthLink submits this memorandum to ensure that the forbearance issue has been fully considered. As EarthLink demonstrates below, the record of these proceedings contains no facts or analysis sufficient for the Commission to conclude that forbearance is warranted under section 10 of the Act.

I. The Commission’s Analysis in the *NPRM* is Wholly Inadequate

The Commission has emphasized in the past that the decision to forbear is not a simple one, and it must be “based upon a record that

⁷ 47 U.S.C. § 160.

⁸ *NPRM* at ¶ 95.

⁹ Comments of Earthlink, Inc., *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Dec. 1, 2000, at 55-59; Reply Comments of Earthlink, Inc., *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Jan. 10, 2001, at n. 39, 121.

¹⁰ Comments of Earthlink, Inc., *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, June 17, 2002, at 15; Reply Comments of Earthlink, Inc., *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Aug. 6, 2002, at 3.

contains more than broad, unsupported allegations.”¹¹ The Commission, having already proposed in the pending Notice of Proposed Rulemaking to negate any potential adverse Ninth Circuit ruling by utilizing its forbearance authority, has provided a list of reasons why it believes forbearance would be appropriate.

Initially, the Commission has tentatively concluded that forbearance is necessary to achieve uniform national treatment of cable modem service as an information service.¹² The Commission’s desire to uniformly treat cable modem service as an information service fails for two reasons. First, if the Court of Appeals for the Ninth Circuit finds that cable modem service contains a telecommunications service, then every cable modem service nationwide contains a telecommunications service.¹³ As a result, the Commission’s stated goal of uniform treatment of cable modem service as an information service can no longer be the basis for the Commission’s action. Forbearance under section 10 cannot transform a “telecommunications service” into an “information service” under the regulatory scheme crafted by Congress.

Second, Congress has already decided what the proper regulatory scheme is for telecommunications services. Any provider of telecommunications services “shall be treated as a common carrier,”

¹¹ *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Order and Report, 15 FCC Rcd 17414 (2000) at ¶ 13 (hereinafter “*Wireless Telecommunications Carriers*”).

¹² NPRM at ¶ 95.

¹³ The Commission is bound by any decision of a court of competent jurisdiction in any action in which the agency is a party. A decision by the Ninth Circuit Court of Appeals that that the transmission component of cable modem service meets the statutory definition of “telecommunications service” would be binding nationwide unless stayed by the court or overturned on appeal. EarthLink has previously noted that the *NPRM* appears to suggest that the Commission believes a decision by the Ninth Circuit may be geographically limited, a suggestion that has no basis in Federal law or practice.

“regardless of the facilities used.”¹⁴ Accordingly, if the Commission wishes to exercise its section 10 forbearance authority, it must explain how forbearance from common carrier regulation of the telecommunications service component of cable modem service is consistent with the statutory requirements of section 10. Because the Commission’s entire treatment of the transmission component of cable modem service has to date been premised on the assumption that such transmission is an information service, the Commission’s analysis is devoid of any discussion of how forbearance would affect consumer protection, competition, and rate reasonableness when that transmission is properly recognized as a telecommunications service instead of an information service.

The other three reasons given by the Commission in the *NPRM* for why forbearance from Title II requirements for cable modem service would be justified are that “cable modem service is in its early stages; supply and demand are still evolving; and several networks providing residential high-speed Internet access are still developing.”¹⁵ All of these reasons combined are not sufficient to trump the Congressional command that telecommunications services “shall” be treated as common carrier services subject to regulation under Title II of the Act.

The Congressional command is without qualification. It does not say that only those providers with market power are to be treated as common carriers, or only those the Commission finds to be well established or mature. All telecommunications carriers, whether incumbents or new entrants, are common carriers for purposes of the Communications Act, and are subject to varying degrees of regulation

¹⁴ See 47 U.S.C. § 153(43) and 47 U.S.C. § 153(46).

¹⁵ *NPRM* at ¶ 95.

under Title II based on the Commission's numerous proceedings establishing which provisions of Title II apply to different types of common carriers.¹⁶ If the Commission wants to establish a new regulatory scheme for common carriers that use cable modems to provide their transmission services, it can do that. It can do so, however, only after it makes the necessary statutory findings with respect to each of the otherwise applicable provisions that the Commission wants to forbear from applying.

While each of the factors asserted by the Commission in the *NPRM* may be relevant to some part of a forbearance analysis, far more is needed to comply with the requirements of section 10. In fact, the record in these proceedings demonstrates that the first two assertions offered by the Commission to support forbearance are simply not true. Cable modem service is not in "in its early stages;" it has been offered to the public for over seven years, and is presently being provided to millions of users nationwide.¹⁷ Likewise, "supply and demand" are not "still evolving;" the industry currently has far more supply than demand, and that demand is experiencing rapid and predictable growth.¹⁸

¹⁶ EarthLink notes that the Commission has yet to forbear from applying the nondiscrimination requirements of sections 201 and 202 of the Act to any common carrier, whether dominant or non-dominant, wireless or wireline. *See infra* note 19.

¹⁷ *See* Robert Sachs, President & CEO of National Cable and Telecommunications Association, Testimony before the House Committee on Energy and Commerce, *The Regulatory Status of Broadband Services: Information Services, Common Carriage, or Something in between?* (July 21, 2003) (transcript available at <http://energycommerce.house.gov/108/Hearings/07212003hearing1024/Sachs1607print.htm>) (stating that cable modem service has been offered for seven years and now reaches more than 12 million consumer households).

¹⁸ *See* Michael K. Powell, Chairman of the Federal Communications Commission, Remarks at the National Summit on Broadband Deployment (Oct. 25, 2001) (available at <http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html>) ("[B]roadband availability is estimated to be this year almost 85%. The intriguing statistic is that though this many households have availability, only 12% of these households have chosen to subscribe."); Robert B. Nelson, Chairman, Committee on Telecommunications, National Association of Regulatory Utility Commissioners (NARUC), Testimony before the House Committee on Energy and Commerce, *The Regulatory Status of Broadband Services: Information Services, Common Carriage, or Something in between?* (July 21, 2003) (transcript available at <http://energycommerce.house.gov/108/Hearings/07212003hearing1024/Nelson1603print.htm>) ("[R]eports

The last assertion, that “several residential networks are still evolving,” if true, simply highlights the fact that competition in the provision of cable modem service, or in the provision of services that are substitutes for cable modem service, is still limited. If competition is limited or non-existent, then it is difficult to see on what basis the Commission can find that bedrock non-discrimination requirements, like those found in sections 201 and 202 of the Communications Act that still apply to every other common carrier under the Commission’s rules, are not needed to ensure that rates are just, reasonable, and non-discriminatory and that consumers are protected, standards the Commission must find to be met before it can grant forbearance under section 10.¹⁹

II. Forbearance Analysis Under Section 10

The statutory test for forbearance under section 10(a) of the Act has three prongs, each of which must be satisfied before the Commission may forbear from enforcing a regulation or provision of the Communications Act.²⁰ Those conditions are that:

suggest that demand and not supply is the primary existing impediment to the expansion of [the broadband] market.”); *see also* John Horrigan, *Pew Internet Project Data Memo*, Pew Internet & American Life Project, at http://www.pewinternet.org/reports/pdfs/PIP_Broadband_adoption.pdf (May 2003) (hereinafter “*Pew Memo*”) (“High-speed Internet adoption at home continues to rise sharply in the United States increasing by 50% from March 2002 to March 2003.”).

¹⁹ *See Wireless Telecommunications Carriers*, 15 FCC Rcd at 17423 (“[W]ith respect to Sections 201 and 202, we held...that these sections codify ‘the bedrock consumer protection obligations’ and that their existence ‘gives the Commission the power to protect consumers by defining forbidden practices and enforcing compliance.’”) (quoting *In the Matter of Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance*, 13 FCC Rcd 16857, 16865). The Commission noted in declining to forbear from sections 201 and 202 that it had “never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market.” *Id.*

²⁰ *See Cellular Telecommunications & Internet Association v. Federal Communications Commission, et al.*, 2003 U.S. App. LEXIS 11317 (June 6, 2003) (hereinafter “*Cellular Telecommunications & Internet Association*”). “The three prongs are conjunctive. The Commission could properly deny a petition for

- (1) “enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory”;
- (2) “enforcement of such regulation or provision is not necessary for the protection of consumers”; and
- (3) “forbearance from applying such provision or regulation is consistent with the public interest.”²¹

The Commission has held that the first step for implementing section 10 is to identify the specific regulatory provisions at issue.²² The forbearance provision in section 10 only applies to “telecommunications carriers” and “telecommunications services.” Therefore, a Ninth Circuit invalidation of the Commission’s regulatory treatment of cable modem service in its *Declaratory Ruling* is a necessary predicate to an action under section 10. Were the Ninth Circuit to overturn the Commission’s ruling and conclude that cable modem service does include a “telecommunications service,” cable companies would be required by statute to render nondiscriminatory service upon reasonable request under sections 201 and 202 of the Communications Act. Forbearance from a requirement that cable companies must sell transmission to unaffiliated internet service providers (“ISPs”) would effectively protect the dominant position that these cable companies presently hold, and have held for some time, in the high-speed Internet access service market.²³ EarthLink has firmly advocated that the section 201 and 202

forbearance if it finds that any one of the three prongs is unsatisfied.” *Id.* at *20. *See also Wireless Telecommunications Carriers* at ¶ 13. The Commission has held that it cannot forbear “in the absence of a record that will permit us to determine that each of the tests set forth in Section 10 is satisfied for a specific...regulatory provision.” *Id.*

²¹ 47 U.S.C § 160(a).

²² *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, 17 FCC Rcd 27000 (2002) at ¶ 17.

²³ *See In the Matter of Section 64.701 of the Commissions Rules and Regulations*, Final Order, 77 FCC2d 384, 474 (1980).

requirements are absolutely essential to the success of the broadband Internet because they would foster both price and service competition within this market.²⁴

III. Geographic Market Discussion

A geographic market analysis is required under section 10 of the Communications Act, which reads, in relevant part: “[t]he Commission shall forbear from applying any regulation...to a telecommunications carrier or telecommunications service...*in any or some* of its or their geographic markets....”²⁵ General assertions regarding the state of the market nationwide are simply not sufficient. The Commission is obligated by statute to perform a market-by-market geographic analysis in each market where the Commission finds forbearance would be appropriate.²⁶

The analysis required under section 10 is similar to that required by the antitrust laws. Both mandate that before a proper competitive analysis can be performed, it is necessary first to determine the relevant market. It is well settled that “[w]ithout a definition of that market there is no way to measure [the] ability to lessen or destroy competition.”²⁷

²⁴ See Comments of Earthlink, Inc., *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, June 17, 2002, at 3-4, 18-19; Reply Comments of Earthlink, Inc., *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Aug. 6, 2002, at 4-6.

²⁵ 47 U.S.C. § 160.

²⁶ See 47 U.S.C. § 160(a).

²⁷ See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). A relevant market has both product and geographic dimensions. All parties agree that broadband constitutes a separate and distinct product market from narrowband. The more complex and contested issue is defining the geographic market. As such, the market analysis focuses solely on defining the relevant geographic market for the purposes of competitive analysis under section 10 of the Communications Act. See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations*

The Commission has determined that the “relevant geographic market for residential high-speed Internet access services [is] local.”²⁸ The Commission has clearly stated that “[w]hile high speed ISPs other than cable operators may offer service over different local areas (e.g. DSL or wireless), or may offer service over much wider areas, even nationally (e.g., satellite), a consumer’s choices are dictated by what is offered in his or her locality.”²⁹ In defining the issue of “locality,” the Commission determined the relevant geographic area for regulatory purposes should be defined “narrowly enough so that competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable.”³⁰

The Commission’s “locality” holding is supported by both applicable antitrust laws and the Department of Justice’s *Horizontal Merger Guidelines*. The Supreme Court has described the relevant geographic market as “the area of effective competition...in which the seller operates, and to which the purchaser can practically turn for supplies.”³¹ Under this standard, the relevant geographic market must be local because, as the Commission itself has asserted through its own research, high-speed Internet access providers vary greatly in different

by *Time Warner inc. and American Online, Inc., Transferors, To AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, CS Docket No. 00-30 (2001) at ¶ 69-71 (hereinafter “*AOL Time Warner*”).

²⁸ *AOL Time Warner* at ¶ 74.

²⁹ *Id.*

³⁰ *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461 (D.C. Cir. 2001).

³¹ *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)) (emphasis omitted); *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 350, 364-365 (1970); *Standard Oil Co. v. United States*, 337 U.S. 293, 299 n.5 (1949).

market areas.³² Therefore, a national analysis of such services would be inadequate. In addition to echoing the antitrust decisions of the Supreme Court, the Justice Department's *Horizontal Merger Guidelines* apply the "smallest market principle" to determine the relevant geographic market.³³ At the core of this principle is the notion that the smallest area where a hypothetical monopolist could impose a "small but significant" increase in price must serve as the relevant geographic market.³⁴

Despite these clear legal requirements for determining the relevant geographic market, the Commission has relied solely on vague assertions regarding the state of national market conditions to support their tentative conclusion that there is a competitive landscape in the high-speed Internet access service market.³⁵ EarthLink is unaware of any analysis performed by the Commission that attempts to define the local market with the specificity required by section 10 of the Communications Act, applicable antitrust law, and Commission precedent. Without such an analysis, the Commission cannot legally find that forbearance is permissible under the statute. Nevertheless, in the interest of completeness, we now analyze each of the three factors of the forbearance test.

³² See Industry Analysis Division, *High Speed Services for Internet Access: Status as of December 31, 2002*, available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0603.pdf, (Federal Communications Commission, June 10, 2003), Table 6.

³³ U.S. Dep't of Justice, *Horizontal Merger Guidelines* (Revised June 1997) at § 1.21.

³⁴ *Id.*

³⁵ NPRM at ¶ 9.

IV. Section 10(a)(1)

Section 10(a)(1) asks if the regulation or provision of the Communications Act the Commission seeks to forbear from applying is “necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory.”³⁶ Section 201 of the Communications Act imposes an affirmative duty on all common carriers to provide service upon reasonable request at just and reasonable rates, and section 202 of the Communications Act prohibits any unjust or unreasonable discrimination in the provision of any common carrier service. The record of this proceeding clearly demonstrates that cable modem service providers have, in the absence of these legal requirements while the Commission ruminated on the legal status of cable modem service, refused to offer service upon reasonable request and have engaged in unreasonable discrimination.³⁷

Cable operators have refused to offer consumers high-speed transmission service unless the consumer subscribes to the cable operator’s information service as well. Likewise, cable operators have refused to offer unaffiliated ISPs the underlying common carrier transmission service that the cable operator uses to provide its own

³⁶ 47 U.S.C. § 160(a)(1).

³⁷ See *Verizon Telephone Companies, et al., v. Federal Communications Commission*, 292 F.3d 903, 907 (D.C. Cir. 2002) (requiring ILECs to provision cross-connects upon request). The Commission found that without a new cross-connect requirement, the “viability of competitive transport” would be restricted. *Id.* According to the Commission, an incumbent’s refusal to provide cross-connects was an “unjust and unreasonable practice in connection with existing services” and therefore “violat[ed] section 201(b)’s requirement that all ‘charges, practices, classifications, and regulations in connection with such communication service...be just and reasonable.’” *Id.* See also *In Re Chastian v. AT&T*, Memorandum Opinion and Order, 49 FCC2d 749 (1973) at ¶ 5 (“Without the presentation of satisfactory technical data to support a complete denial of [common carrier service], the company’s practice amounted to an unreasonable refusal to furnish requested service and therefore constituted a violation of Section 201(a).”).

information service. Thus, the Commission is not faced with a hypothetical question about possible future unreasonable practices by cable operators if it should forbear, but rather a present and complete refusal by the cable industry to deal with consumers and ISPs at all. This documented voluntary behavior, which is *per se* unreasonable and has occurred nationwide for years, is clear evidence that an exemption from the fundamental section 201 and 202 requirements would fail the first prong of the forbearance test.

Moreover, the Commission has held that where one entity maintains a dominant position in its market, and enjoys significant competitive advantages as a result, there is potential for that entity to adversely affect competition within the market, and therefore, forbearance from regulation would not be appropriate under the first prong of the forbearance test.³⁸ As the Commission has pointed out in its *NPRM*, cable accounts for almost two-thirds of the national market share of the broadband Internet access market.³⁹ Given the established geographic limitations of DSL⁴⁰ and the fact that other service providers

³⁸ *In the Matter of Petition of US West Communications Inc. for Forbearance*, Memorandum Opinion and Order, 14 FCC Rcd 16252 (1999) at ¶ 35. The Commission held that, given US West's dominant position in the local exchange and exchange access markets, any discrimination between US West and unaffiliated entities with respect to in-region telephone numbers would be unjust and unreasonable and therefore US West would not be able to satisfy the first prong of the forbearance analysis. *Id.*

³⁹ *NPRM* at ¶ 9. The Commission's own documents show that cable accounts for approximately 68 percent of the broadband Internet access market. "[C]able modem service has been the most widely subscribed to technology, with industry analysts estimating that approximately 68% of residential broadband subscribers today use cable modem service." *Id.* See also Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections* (May 2003), Cable Datacom News, at <http://www.cabledatacomnews.com/cmhc/cmhc16a.html> (last visited June 17, 2003) (citing statistics that show that as recently as May 2003, the cable industry still accounted for approximately 66% of the total 22 million residential broadband subscribers); *Pew Memo*, *supra* note 18 ("[C]able modem users far outnumber subscribers to digital subscriber line service."). The chart supplied by the report indicates that as of March 2003, 67 percent of broadband users connect using cable modems—up from 63 percent in March 2002 – while DSL had 28 percent of the broadband market in 2003, down from 34 percent a year earlier. *Id.*

⁴⁰ See Industry Analysis Division, *High Speed Services for Internet Access: Status as of December 31, 2002*, available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0603.pdf (Federal Communications Commission, June 10, 2003), Table 7. FCC state-wide statistics indicate that several states are dominated by cable providers over DSL providers.

like satellite and fixed wireless are not expected to be viable alternatives in the near future,⁴¹ cable's market share in many local markets is realistically much greater than its national aggregate, and potentially close to or at 100 percent in numerous relevant market areas across the country.⁴²

The Commission itself has recognized cable's dominant position in the market,⁴³ as well as the ability of and incentive for a cable operator to adversely affect competition in the provision of residential broadband services.⁴⁴ The Commission's own precedent on forbearance dictates that, given the state of the competitive landscape in the broadband market, forbearance would not be appropriate under section 10(a)(1) in this instance because of the demonstrated proclivity of the cable industry to pursue unjust and unreasonable practices within the market.

V. Section 10(a)(2)

The second prong of the section 10 forbearance test requires the Commission to determine whether enforcement of common carrier

⁴¹ *Id.* at Table 1 (citing statistics that show that both satellite and fixed wireless have a combined national subscribership of approximately 275,000, compared to cable's 11.3 million alone).

⁴² Hausman, Sidak, and Singer, *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, 18 YALE J. on REG. 129, 155-158 (Winter 2001). Using data compiled by Yankee Group, Telechoice, and Forrester Research on cable and DSL market share estimates, the study determines that the market share for DSL is overstated and that cable's share of the high-speed residential broadband market is estimated to be higher than the national statistics would otherwise indicate. *Id.* at 155.

⁴³ NPRM at ¶ 9 (“[C]able modem service has been the most widely subscribed to technology....In the past year, some incumbent LECs have scaled back their DSL deployment plans [as] cable's lead over DSL has grown.”).

⁴⁴ See, e.g., *AOL Time Warner* at ¶ 56. (“[W]e find that, absent mitigating conditions, the proposed merger would undermine competition in the provision of residential high-speed Internet access services.... We also find that the proposed merger would give AOL Time Warner the ability and the incentive to discriminate against unaffiliated ISPs....”). *Id.*

regulation is necessary for the protection of consumers.⁴⁵ While the Commission has yet to explain how consumers would ultimately be protected by forbearance, it is likely that it would vaguely assert, as it has in the past, that consumers are protected in a “competitive free market...unfettered by Federal or State regulation.”⁴⁶ The Commission, however, assumes what it must affirmatively demonstrate. The requirement to provide just, reasonable, and nondiscriminatory service upon request have been the core consumer protection principles in the Communications Act since 1934. These requirements were originally enacted to protect consumers from monopoly providers of service. But even after competition became much more commonplace in various markets, Congress continued to require the application of sections 201 and 202.

In 1993 when Congress established the rules for the provision of wireless services it decided that common carrier rules would apply. Three years later, in 1996, when Congress created the rules for local competition, it once again decided that common carrier regulation was in general necessary to protect consumers and mandated that all providers of telecommunications service, whether dominant or non-dominant, old or new, “shall” be subject to these requirements.

⁴⁵ See 47 U.S.C. § 160(a)(2). The D.C. Court of Appeals has recently held that the term “necessary,” in the context of the first and second prongs of the forbearance test, is not to be construed as “absolutely required” or “indispensable,” but rather having a “strong connection between what the agency does by way of regulation and what the agency permissibly seeks to achieve with that regulation. The D.C. Court of Appeals determined that, to hold otherwise, would leave the second prong of the forbearance test with no application at all. See also *Cellular Telecommunications & Internet Association*, 2003 U.S. App. LEXIS 11317, at *5-6, *22-23.

⁴⁶ NPRM at ¶ 4.

For a substantial portion of the population in this country, the high-speed Internet access market is a monopoly, or at best a duopoly.⁴⁷ It is unreasonable, in fact absurd, for the Commission to assume that in the absence of any requirement to provide nondiscriminatory service a monopoly or duopoly marketplace will suddenly foster competition and provide consumers with lower prices and greater choice. To the contrary, in the absence of a regulatory requirement to provide nondiscriminatory service the cable companies have to date uniformly refused to enter into reasonable contracts with unaffiliated ISPs to permit them to provide consumers service using the cable network.⁴⁸ In fact, the Commission has previously ruled, in the context of other common carriers, that in the absence of competition, forbearance is not in the best interest of the consumer because without regulation the telecommunications service provider could discriminate against certain customers who lack competitive alternatives.⁴⁹ The same is true here.

⁴⁷ See Jason Bazinet, *The Cable Industry*, J.P. Morgan Equity Research (Nov. 2, 2001), Figure 36 (citing statistics that show that almost one-half of the country is subject to a facilities monopoly and that another one-third are subject to a facilities duopoly); see also Dr. Mark Cooper, *The Failure of "Intermodal" Competition in Cable Markets*, Consumer Federation of America, at 45-47 (Apr. 2002) (citing Commission research that shows that only 10 percent of all U.S. zip codes are even moderately concentrated with the availability of high-speed service choice). The FCC's data shows that approximately three-fifths of the nation has either no broadband ISP service, monopoly service, or duopoly service, and that another quarter of the nation is still only exposed to a tight oligopoly. *Id.* at 47.

⁴⁸ EarthLink is particularly qualified to comment in this respect. EarthLink has been actively attempting to negotiate reasonable carriage agreements for years with all of the major cable system operators. To date EarthLink has entered into contracts to provide cable modem service with three different cable system operators. In each case EarthLink was only able to conclude an agreement when the cable system operator was either required to enter into such an agreement as part of a merger condition, or when the cable system operator had a merger application pending before the Commission. In each case the agreement under which EarthLink operates is either constrained to those markets in which an ISP affiliated with the cable system operator is also offering service, or is limited to only a small subset of the markets served by that particular cable system operator.

⁴⁹ See *In the Matter of Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier*, Memorandum Opinion and Order, 14 FCC Rcd 19947 (1999) at ¶ 34 (holding that absent competition, regulation was necessary to protect consumers from discrimination in the form of unreasonably high rates for service, and therefore the second prong of the forbearance analysis was not met).

In another proceeding, the Commission determined that the second prong of the forbearance test was met when consumers are protected in three ways: (1) forbearance would lead to promotion of a fully competitive market; (2) forbearance would ensure that no competitor will have an unfair advantage in the relevant market; and (3) forbearance will stimulate the entry of new providers in the relevant market.⁵⁰ None of those circumstances exists here.

As discussed above, the record in this proceeding demonstrates that the years of de facto forbearance by the Commission with respect to imposing common carrier requirements on cable operators providing cable modem service have not resulted in a competitive market. In fact, just the opposite had occurred. The top providers of broadband Internet access service are all affiliated with or owned by facility operators, while the vast majority of ISPs in the United States are unable to provide broadband services to consumers because they are unable to get transmission services on reasonable terms and conditions, if they can get them at all.

Continued forbearance certainly will not ensure that no competitor has an unfair advantage in the market. Again, the opposite is true. Absent the nondiscrimination requirements of sections 201 and 202 of the Communications Act, it is clear that cable operators will continue to favor their own affiliated ISP.

Finally, forbearance has not, and will not in the future, stimulate the entry of new providers in the relevant market. If facility owners are

⁵⁰ *In the Matter of Petition of SBC Communications Inc. for Forbearance*, Memorandum Opinion and Order, 2003 WL 1961215 (Apr. 28, 2003) at ¶ 16. (Using this framework in that case, the Commission ruled that the enforcement of section 272 was not necessary to prevent SBC from engaging in conduct that would harm consumers).

able to refuse to sell transmission services to new entrants, then the number of new entrants can be expected to be limited to the number of new high speed transmission networks being built to residential consumers, of which there are none at present.

VI. Sections 10(a)(3) and 10(b)

The third and final prong of the section 10 forbearance analysis mandates that the Commission must determine that forbearance from applying regulation is consistent with the public interest.⁵¹ As part of this statutory analysis, section 10(b) specifies that in making the public interest determination under section 10(a)(3), the Commission “shall consider whether forbearance from enforcing the...regulation will promote competitive market conditions,” including whether it will enhance competition among existing telecommunications service providers.⁵²

As EarthLink has previously stated, the current broadband market, which the Commission has allowed to operate without a legal compulsion for cable companies to open their networks to competitors, is one where most consumers have virtually no meaningful choice of broadband Internet access service providers. With regard to the statutory requirements of section 10(b), the only rational way to show forbearance is in the public interest is to show that such forbearance will lead to the introduction of competition in the high-speed broadband Internet access market. If cable companies have chosen not to voluntarily open their networks to competitors without regulation in the

⁵¹ 47 U.S.C. § 160(a)(3).

⁵² 47 U.S.C. § 160(b); *see also Wireless Telecommunications Carriers* at *14.

past, the Commission cannot now logically argue that forbearance from regulation will produce a different result.

Congress has established the presumption in the Communications Act that the public interest is best served by application of the various common carrier requirements of Title II to all providers of telecommunications service. This presumption was not established long ago. It was established in 1996. Further, Congress decided that all providers, “regardless of the facilities used,” would start out subject to those requirements. While Congress granted the Commission the authority to forbear from applying those requirements, the Commission bears the burden of showing the circumstances in a particular market are such that Congress’ presumption is no longer correct and the public interest would be better served by forbearance. Blithe assertions about possible future competition, or about the Commission’s desire to promote the deployment of broadband facilities (which the record shows with respect to cable facilities are already widely deployed), fall far short of meeting that burden.

Conclusion

For all of the foregoing reasons, it is clear that the Commission may not forbear from applying, at a minimum, sections 201 and 202 of the Act to the common carrier transmission service used to provide cable-based internet access services to the public