

August 7, 2003

**EX PARTE**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
The Portals  
TW-A325  
445 12<sup>th</sup> 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 August 7, 2003, Dave Baker, Vice President of Law and Public Policy for EarthLink, and Earl Comstock of Sher & Blackwell met separately with Johanna Mikes and Scott Bergmann of Commissioner Adelstein's office and Paul Gallant of Chairman Powell'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, 9<sup>th</sup> 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. EarthLink provided Ms. Mikes, Mr. Bergmann, and Mr. Gallant 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, the meeting participants 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). In this regard, EarthLink pointed out that if the court in the *Brand X* case rules as a matter of law that the transmission component of a cable-based broadband Internet access service is a telecommunications service, then the same analysis would also govern the Commission's treatment of bundled broadband transmission and Internet access services in the Wireline Broadband proceeding. Specifically, the issue before the Ninth Circuit is whether the bundling of a telecommunications service with an Internet access service changes the regulatory classification of the telecommunications service component of the bundled service.

Ms. Marlene Dortch  
August 7, 2003  
Page 2

EarthLink has argued that such bundling has no effect on the statutory classification of the underlying transmission service. Because the Act defines "telecommunications service" based on its functionality to the user and the manner in which it is offered (i.e., to the public for a fee), "regardless of the facilities used," the other services with which that transmission is bundled and whether the transmission involved is provided using cable, copper, fiber or any other medium are irrelevant. As a summary of this argument, EarthLink provided Ms. Mikes and Mr. Gallant with copies of EarthLink's opening brief in the *Brand X* case, noting that the arguments made in the brief with respect to the proper statutory classification of the transmission component of a retail "cable modem service" offering are also directly and fully applicable to retail DSL or other "wireline" broadband Internet access service bundles. EarthLink urged that the Commission should consider carefully the statutory arguments made in the brief as it deliberates this issue in the Wireline Broadband proceeding. Finally, EarthLink suggested that it would be prudent for the Commission to wait to see the Ninth Circuit's order in the *Brand X* case before making a decision in the Wireline Broadband proceeding.

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

---

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."<sup>1</sup> The Commission instead classified cable modem service,

---

<sup>1</sup> *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.”<sup>2</sup> 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.”<sup>3</sup> This exact issue is again before the Ninth Circuit Court of Appeals in *Brand X Internet Services v. FCC*.<sup>4</sup> 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)*<sup>5</sup> 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.<sup>6</sup> 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

---

<sup>2</sup> *Id.* at ¶ 7.

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

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

<sup>5</sup> *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”).

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

telecommunications services.”<sup>7</sup> 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.<sup>8</sup>

EarthLink has addressed the issue of forbearance in its Comments and Reply Comments in the *Notice of Inquiry*<sup>9</sup> that preceded the *NPRM*, as well as its Comments and Reply Comments in this proceeding.<sup>10</sup> 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

---

<sup>7</sup> 47 U.S.C. § 160.

<sup>8</sup> *NPRM* at ¶ 95.

<sup>9</sup> 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.

<sup>10</sup> 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.”<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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,”

---

<sup>11</sup> *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*”).

<sup>12</sup> NPRM at ¶ 95.

<sup>13</sup> 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.”<sup>14</sup> 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.”<sup>15</sup> 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

---

<sup>14</sup> See 47 U.S.C. § 153(43) and 47 U.S.C. § 153(46).

<sup>15</sup> *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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

---

<sup>16</sup> 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.

<sup>17</sup> *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).

<sup>18</sup> *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/spmcp110.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.<sup>19</sup>

## **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.<sup>20</sup> 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](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.”).

<sup>19</sup> 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.*

<sup>20</sup> 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.”<sup>21</sup>

The Commission has held that the first step for implementing section 10 is to identify the specific regulatory provisions at issue.<sup>22</sup> 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.<sup>23</sup> 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.*

<sup>21</sup> 47 U.S.C § 160(a).

<sup>22</sup> *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.

<sup>23</sup> *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.<sup>24</sup>

### **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....”<sup>25</sup> 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.<sup>26</sup>

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.”<sup>27</sup>

---

<sup>24</sup> 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.

<sup>25</sup> 47 U.S.C. § 160.

<sup>26</sup> See 47 U.S.C. § 160(a).

<sup>27</sup> 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.”<sup>28</sup> 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.”<sup>29</sup> 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.”<sup>30</sup>

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.”<sup>31</sup> 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*”).

<sup>28</sup> *AOL Time Warner* at ¶ 74.

<sup>29</sup> *Id.*

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

<sup>31</sup> *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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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.

---

<sup>32</sup> 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](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0603.pdf), (Federal Communications Commission, June 10, 2003), Table 6.

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

<sup>34</sup> *Id.*

<sup>35</sup> 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.”<sup>36</sup> 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.<sup>37</sup>

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

---

<sup>36</sup> 47 U.S.C. § 160(a)(1).

<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> Given the established geographic limitations of DSL<sup>40</sup> and the fact that other service providers

---

<sup>38</sup> *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.*

<sup>39</sup> *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.*

<sup>40</sup> 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](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,<sup>41</sup> 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.<sup>42</sup>

The Commission itself has recognized cable's dominant position in the market,<sup>43</sup> as well as the ability of and incentive for a cable operator to adversely affect competition in the provision of residential broadband services.<sup>44</sup> 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

---

<sup>41</sup> *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).

<sup>42</sup> 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.

<sup>43</sup> 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.”).

<sup>44</sup> *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.<sup>45</sup> 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.”<sup>46</sup> 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.

---

<sup>45</sup> 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.

<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> The same is true here.

---

<sup>47</sup> 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.

<sup>48</sup> 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.

<sup>49</sup> 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.<sup>50</sup> 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

---

<sup>50</sup> *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.<sup>51</sup> 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.<sup>52</sup>

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

---

<sup>51</sup> 47 U.S.C. § 160(a)(3).

<sup>52</sup> 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

Nos. 02-70518, 02-70684, 02-70685, 02-70686,  
02-70879, 02-71425, 02-72251

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

Brand X Internet Services, et al.,

Petitioners,

v.

Federal Communications Commission  
and the United States of America,

Respondents.

---

Petition for Review of an Order of the  
Federal Communications Commission

---

BRIEF OF PETITIONER EARTHLINK, INC.

John W. Butler  
Earl W. Comstock  
Alison Macdonald  
SHER & BLACKWELL, LLP  
1850 M Street, N.W, Suite 900  
Washington, DC 20036  
(202) 463-2500  
Counsel for EarthLink, Inc.

David N. Baker  
Vice President for Law  
and Public Policy  
EarthLink, Inc.  
1375 Peachtree Street  
Atlanta, GA 30309

October 10, 2002

## Table of Contents

	Page
Table of Authorities .....	iii
I. BASIS FOR THE AGENCY’S SUBJECT MATTER JURISDICTION .....	2
II. JURISDICTION OF THIS COURT AND FINALITY OF DECISION FOR WHICH REVIEW IS SOUGHT .....	2
III. DATES OF ORDER APPEALED FROM AND EARTHLINK PETITION FOR REVIEW .....	4
IV. ISSUES PRESENTED .....	4
V. STATEMENT OF THE CASE .....	5
VI. SUMMARY OF ARGUMENT.....	12
A. First Question Presented .....	12
B. Second Question Presented.....	18
C. Third Question Presented.....	18
VII. ARGUMENT.....	19
A. The Commission Was Wrong As A Matter Of Law When It Held That Cable Modem Service Does Not Include A Telecommunications Service .....	19
1. This Court Has Already Ruled that Companies that Provide Internet Access Service Over Their Own Cable Facilities Are Providing Two Services, One of Which Is a “Telecommunications Service.” .....	19
2. The Plain Language of the Communications Act Defines the Transmission Underlying Internet Access Service Offered to the Public for a Fee as a “Telecommunications Service.” .....	27

3.	The Commission’s Holding that Cable Modem Service Does Not Include a Telecommunications Service Contradicts Twenty Years of Commission Precedent – Precedent that the Commission Has Held Congress Adopted in the Telecommunications Act of 1996.....	34	
	a.	The Commission’s precedent ..... 35	
	b.	The Commission has held that Congress adopted the <i>Computer II</i> basic/enhanced framework when it enacted the Telecommunications Act of 1996. 39	
	c.	The basis on which the Commission attempts to distinguish <i>Computer II</i> and its progeny is precluded by the Act..... 41	
B.	The Commission’s Holding That AOL Time Warner Offers Transmission To ISPs On A Private Carriage Basis Is Contrary To Law and Unsupported By The Record .....	45	
C.	The Commission’s Waiver Of The <i>Computer II</i> Unbundling And Nondiscrimination Requirements For Cable Companies That Also Provide Local Exchange Service Was Unlawful ....	51	
	1.	The Authority Cited by the Commission Is by Its Own Terms Inadequate to Support the Waiver .....	51
	2.	The Commission Violated the Administrative Procedure Act and Its Own Regulations by Issuing the Waiver Without Notice and Without Providing an Opportunity for Public Comment.....	53
	3.	The Waiver Impermissibly Circumvents the Statutory Forbearance Procedures and Standards in Section 10 of the Communications Act .....	55
	4.	The Waiver Does Not Meet the Standards Set by Commission and Judicial Precedent. ....	59
VIII.	CONCLUSION. ....	60	
Addendum			

## Table of Authorities

	Page
<b>Cases</b>	
<i>Alcaraz v. Block</i> , 746 F.2d 593 (9 <sup>th</sup> Cir. 1984).....	54
<i>Amalgamated Transit Union v. Skinner</i> , 894 F.2d 1362 (D.C. Cir. 1990).....	55
<i>AT&amp;T Corp. v. City of Portland</i> , 216 F.3d 871 (9 <sup>th</sup> Cir. 2000).....	<i>passim</i>
<i>Bell Atlantic Telephone Companies v. F.C.C.</i> , 206 F.3d 1 (D.C. Cir. 2000).....	31
<i>Beverly Enterprises, Inc. v. Herman</i> , 49 F. Supp.2d 1 (D.D.C. 2000).....	55
<i>Chevron U.S.A. v. N.R.D.C.</i> , 467 U.S. 837 (1984).....	20, 27
<i>Chisholm v. F.C.C.</i> , 538 F.2d 349 (D.C. Cir. 1976).....	54
<i>City of Dallas v. F.C.C.</i> , 165 F.3d 341 (5 <sup>th</sup> Cir. 1999).....	20
<i>Computer and Communications Industry Association v. F.C.C.</i> , 693 F.2d 198 (D.C. Cir. 1982).....	5, 15, 16
<i>Desert Citizens Against Pollution v. Bisson</i> , 231 F.3d 1172 (9 <sup>th</sup> Cir. 2000).....	46
<i>Greater Boston Television Corporation v. F.C.C.</i> , 444 F.2d 841 (D.C. Cir. 1970).....	45
<i>In Re Sealed Case</i> , 237 F.3d 657 (D.C. Cir. 2001).....	56
<i>Ladha v. INS</i> , 215 F.3d 889 (9 <sup>th</sup> Cir. 2000).....	21, 23
<i>Lechmere, Inc. v. N.L.R.B.</i> , 502 U.S. 527 (1992).....	21
<i>Louisiana-Pacific Corp. v. N.L.R.B.</i> , 52 F.3d 255 (9 <sup>th</sup> Cir. 1995).....	43
<i>Maislin Industries v. Primary Steel, Inc.</i> , 497 U.S. 116 (1990).....	21
<i>McClaskey v. United States Department of Energy</i> , 720 F.2d 583 (9 <sup>th</sup> Cir. 1983).....	42
<i>MCI Telecommunications Corp. v. AT&amp;T</i> , 512 U.S. 218 (1994).....	55
<i>Memorial, Inc. v. Harris</i> , 655 F.2d 905 (9 <sup>th</sup> Cir. 1980).....	52
<i>National Association of Regulatory Utility Commissioners v. F.C.C.</i> , 525 F.2d 630 (D.C. Cir. 1976).....	47
<i>National Association of Regulatory Utility Commissioners v. F.C.C.</i> , 533 F.2d 601 (1976).....	47
<i>National Cable &amp; Telecommunications Association, Inc. v. Gulf Power Co.</i> , 534 U.S. 327 (2002).....	8
<i>Neal v. U.S.</i> , 516 U.S. 284 (1996).....	21
<i>Neighborhood TV Co., Inc. v. F.C.C.</i> , 742 F.2d 629 (D.C. Cir. 1984).....	54
<i>Northeast Cellular Telephone Co., L.P. v. F.C.C.</i> , 897 F.2d 1164 (D.C. Cir. 1990).....	59, 60
<i>PDK Labs v. Reno</i> , 134 F. Supp.2d 24 (D.D.C. 2001).....	56
<i>Royal Foods Co., Inc. v. RJR Holdings Inc.</i> , 252 F.3d 1102 (9 <sup>th</sup> Cir. 2001).....	21
<i>Southwestern Bell Telephone Co. v. F.C.C.</i> , 19 F.3d 1475 (D.C. Cir. 1994).....	49
<i>United States v. Calamaro</i> , 354 U.S. 351 (1957).....	33
<i>Vincent v. Apfel</i> , 191 F.3d 1143 (9 <sup>th</sup> Cir. 1999).....	32
<i>WAIT Radio v. F.C.C.</i> , 418 F.2d 1153 (D.C. Cir. 1969).....	59
<i>Wilson v. A. H. Belo Corp.</i> , 87 F.3d 393 (9 <sup>th</sup> Cir. 1996).....	3

## Statutes, Regulations, and Rules

5 U.S.C. § 554.....	2, 54
28 U.S.C. § 2112(a)(3).....	4
28 U.S.C. § 2342(1).....	2
28 U.S.C. § 2344.....	4
47 U.S.C. § 153.....	2, 27
47 U.S.C. § 153(20).....	8, 14, 28, 52
47 U.S.C. § 153(43).....	8, 29
47 U.S.C. § 153(44).....	6, 9
47 U.S.C. § 153(46).....	<i>passim</i>
47 U.S.C. § 153(48).....	33
47 U.S.C. § 153(52).....	2
47 U.S.C. § 154(i).....	2
47 U.S.C. § 160.....	7, 19, 55, 56, 58
47 U.S.C. § 201.....	3, 7, 52
47 U.S.C. § 202.....	3, 7, 50, 52
47 U.S.C. § 251(c)(3).....	11
47 U.S.C. § 402(a).....	2, 3
47 U.S.C. § 522(6).....	25
47 U.S.C. § 541(b).....	24, 26
47 C.F.R. § 1.3.....	51, 52, 53
47 C.F.R. § 1.4.....	4
47 C.F.R. § 1.103(b).....	4
Fed. R. App. P. 28(a)(6).....	5
Fed. R. App. P. 28(a)(7).....	5

## Agency Decisions

<i>In Re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)</i> , Final Decision, 77 F.C.C. 2d 384 (1980).....	<i>passim</i>
<i>In Re Federal-State Joint Board on Universal Service</i> , Report To Congress, 13 F.C.C.R. 11501 (1998).....	17, 40, 56
<i>In Re Filing and Review of Open Network Architecture Plans</i> , Memorandum and Order, 4 F.C.C.R. 1 (1988).....	37
<i>In Re Independent Data Communications Mfrs Ass'n, Inc. Petition for Declaratory Ruling that AT&amp;T's InterSpan Frame Relay Service is a Basic Service; and Am. Tel. and Tel. Co. Petition for Declaratory Ruling That All IXC's Be Subject to the Commission's Decision on the IDCMA Petition</i> , Memorandum Opinion and Order, 10 F.C.C.R. 13717 (October 18, 1995).....	38

Nos. 02-70518, 02-70684, 02-70685, 02-70686,  
02-70879, 02-71425, 02-72251

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

Brand X Internet Services, et al.,

Petitioners,

v.

Federal Communications Commission  
and the United States of America,

Respondents.

---

**BRIEF OF PETITIONER EARTHLINK, INC.**

EarthLink, Inc. (“EarthLink”) submits this brief in accordance with the Court’s Order dated August 6, 2002. The agency order for which review is sought is the Federal Communications Commission’s Declaratory Ruling, released on March 15, 2002, in *In Re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185 (“Declaratory Ruling”). The Declaratory Ruling is set forth beginning on page 0110 of the Excerpts of Record.

**I. BASIS FOR THE AGENCY’S SUBJECT MATTER JURISDICTION.**

The Federal Communications Commission (“Commission” or “FCC”) had jurisdiction to issue the challenged Declaratory Ruling pursuant to the Administrative Procedure Act, 5 U.S.C. § 554(e), and sections 2, 3, and 4(i) of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. §§ 152, 153, and 154(i), because the services at issue constitute “wire communication” within the meaning of section 3(52) of the Act, 47 U.S.C. § 153(52). The Commission also had jurisdiction (although the Declaratory Ruling suggests otherwise) under Title II of the Act, 47 U.S.C. §§ 201-276, because the services at issue are “telecommunications services” within the meaning of section 3(46) of the Act, 47 U.S.C. § 153(46).

**II. JURISDICTION OF THIS COURT AND FINALITY OF DECISION FOR WHICH REVIEW IS SOUGHT.**

This Court has jurisdiction under 28 U.S.C. § 2342(1) and section 402(a) of the Act, 47 U.S.C. § 402(a). The Declaratory Ruling appealed from is final because it contains a definitive interpretation of key statutory terms and because it fixes the legal relationship between cable companies and unaffiliated Internet service providers (“ISPs”) that seek to purchase transmission services from those cable companies. The Declaratory Ruling fixes that legal relationship by holding that cable companies do not provide

“telecommunications service,” and thus are not common carriers, with respect to the transmission underlying the Internet access services that those cable companies provide to the public for a fee over their own cable facilities. By holding that the transmission underlying cable-based Internet access service is not a common carrier service, the Commission has foreclosed the ability of ISPs to obtain that transmission as a matter of statutory right on nondiscriminatory terms and conditions as required by sections 201 and 202 of the Act, 47 U.S.C. §§ 201, 202. *See, e.g., Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (9<sup>th</sup> Cir. 1996) (FCC declaratory order is a “final order” reviewable under Section 402(a) of the Act, 47 U.S.C. § 402(a)).<sup>1</sup>

---

<sup>1</sup> In the same document as the Declaratory Ruling, the Commission issued a Notice of Proposed Rulemaking (“NPRM”) that asks, among other things, whether it should adopt a “multiple ISP access” requirement. The proposed authority for any such requirement (which is not in fact proposed, but only asked about) would be the Commission’s “ancillary” jurisdiction under Title I of the Act, not its Title II common carrier authority. Excerpt at 0154. Thus, in the event that the Commission were to adopt some sort of requirement that cable companies sell transmission to unaffiliated ISPs, such adoption would not change the Commission’s legal determination challenged here, i.e., that the telecommunications underlying cable-based Internet access service is not a common carrier “telecommunications service” to which ISPs have access as a matter of statutory right. With respect to the second and third questions presented, there is nothing in the NPRM that indicates any intention by the Commission to revisit the findings challenged here.

### **III. DATES OF ORDER APPEALED FROM AND EARTHLINK PETITION FOR REVIEW.**

The Declaratory Ruling appealed from was adopted by the Commission on March 14, 2002, and was released to the public on March 15, 2002. Under the Commission's rules, non-rulemaking documents become final upon release to the public. *See* 47 C.F.R. §§ 1.4 and 1.103(b). EarthLink filed its Petition for Review on March 22, 2002, in the United States Court of Appeals for the District of Columbia Circuit. The Judicial Panel on Multidistrict Litigation issued an order on April 1, 2002, transferring EarthLink's appeal to this Court for consolidation with related appeals pursuant to 28 U.S.C. § 2112(a)(3). This appeal is timely under 28 U.S.C. § 2344.

### **IV. ISSUES PRESENTED.**

EarthLink presents the following three issues for review:

1. Whether the Commission erred as a matter of law in holding that Internet access service provided by cable operators to the public over their own cable transmission facilities ("cable modem service" in the language of the Declaratory Ruling) "does not include an offering of telecommunications service" as the term "telecommunications service" is defined in the Act.

Excerpt at 0135.

2. Whether the Commission acted arbitrarily, without substantial evidence, and contrary to law in holding that AOL Time Warner provides a private carriage service rather than a common carriage service to the extent that it provides transmission over its cable facilities to unaffiliated Internet service providers (“ISPs”). Excerpt at 0142.

3. Whether the Commission’s waiver for some cable companies of the *Computer II*<sup>2</sup> unbundling and nondiscrimination requirements was unlawful because of lack of notice and opportunity for public comment, inconsistency with the Act, and lack of a reasoned basis grounded in substantial evidence. Excerpt at 0137.

## V. STATEMENT OF THE CASE.<sup>3</sup>

This appeal is from the Declaratory Ruling released by the Federal Communications Commission (“FCC” or “Commission”) on March 15,

---

<sup>2</sup> *In Re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C. 2d 384 (1980), *aff’d sub nom. Computer and Communications Industry Ass’n v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982), *cert denied*, 461 U.S. 938 (1983) (hereinafter “*Computer II*”).

<sup>3</sup> Because the issues presented involve only questions of law, the statement of facts specified by Fed. R. App. P. 28(a)(7) is incorporated in the Fed. R. App. P. 28(a)(6) statement of the case.

2002, in GN Docket No. 00-185, *In Re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*. The proceeding was initiated by the Commission's issuance of a Notice of Inquiry, released on September 28, 2000. Excerpt at 0113. Comments, reply comments, and permitted *ex parte* presentations totaling some 336 separate entries were received in the record. *See* Certified List of Items in the Record, filed by the Commission with the Court on May 29, 2002. Excerpt at 0185.

The central issue decided by the Commission and now before this Court is whether the transmission component of an Internet access service offered to the public for a fee by cable companies using their own facilities is a "telecommunications service" within the meaning of section 3(46) of the Act, 47 U.S.C. § 153(46). The Commission decided that such transmission does not constitute a telecommunications service. If, contrary to the Commission's decision, the transmission component of cable-based Internet access service is a "telecommunications service," then that transmission is by definition a "common carrier" service. 47 U.S.C. § 153(44) ("A telecommunications carrier [provider of telecommunications services] shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services. . ."). Common carriers are required under sections 201 and 202 of the Act, 47 U.S.C. §§ 201 and

202, to sell their telecommunications services on nondiscriminatory terms and conditions to any legitimate purchaser that requests them unless the Commission relieves the common carrier of that obligation by exercising its forbearance authority under section 10 of the Act. *See* 47 U.S.C. § 160.<sup>4</sup> Therefore, if the transmission services here at issue are common carrier telecommunications services, then cable companies that provide those services must sell them on nondiscriminatory terms to unaffiliated ISPs, something that cable companies have refused to do.

The statutory classification issue has been popularly referred to over the past several years as the “cable open access” debate. At stake is whether ISPs that are not affiliated with cable companies have a statutory right to demand and receive transmission service at reasonable rates and on nondiscriminatory terms from cable companies that use their own transmission facilities to provide Internet access service to the public. The simple question of whether the transmission component of an Internet access service offered to the public by a cable company is a common carrier telecommunications service has been presented to the Commission at least six times over the past four years. *See National Cable & Telecomm. Ass’n*

---

<sup>4</sup> The Commission has not exercised its forbearance authority with respect to these services. The Commission expressly reserved that issue for further consideration in the NPRM issued along with the Declaratory Order. Excerpt at 0159.

*v. Gulf Power Co.*, 534 U.S. 327, 122 S.Ct. 782, 798 (2002) (dissenting opinion). The Declaratory Order is the first and only time that the Commission has chosen to address the question.

This case turns on the relationships among three defined terms in the Act: “information service,” “telecommunications,” and “telecommunications service.” The Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications. . . .*” 47 U.S.C. § 153(20) (emphasis added). The Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). “Telecommunications service” is a subset of “telecommunications.” “[T]elecommunications service’ means the offering of telecommunications for a fee directly to the public. . . .” 47 U.S.C. § 153(46).

The challenged Declaratory Ruling issued by the Commission held that an Internet access service offered to the public for a fee by a cable company is an “information service” that is offered “via telecommunications,” but that the telecommunications involved is not a

“telecommunications service.” Excerpt at 0135. The Commission’s stated reason for this last finding is that the telecommunications over which the information service of Internet access is delivered is not offered to the consumer “separately” or on a “stand-alone” basis” from the information service. Excerpt at 0135-36.

The Commission’s finding that the telecommunications underlying cable-based Internet access service is not a “telecommunications service” necessarily means that it is also not a “common carrier” service. Excerpt at 0142 n. 205 (“telecommunications service” and “common carrier” service synonymous); 47 U.S.C. § 153(44) (“A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services. . .”). Because only common carriers have a statutory obligation to provide transmission service upon reasonable demand, the Commission’s holding that the transmission underlying cable Internet access service is not a common carrier service means that ISPs such as EarthLink do not have a statutory right to obtain transmission services at reasonable and nondiscriminatory rates from cable companies that provide transmission service to their own customers as part of a “cable modem service,” the Commission’s term for the bundled offering

of Internet access service and the telecommunications over which that service is delivered.

Cable-based transmission is the most widely available mode of delivering high speed or “broadband” access to the Internet, comprising approximately sixty-eight percent of the high speed residential market. Excerpt at 0115. Notwithstanding a handful of agency-imposed and voluntary agreements, denial of a statutory right to purchase this transmission service from cable companies effectively prevents EarthLink and other ISPs from providing cable-based Internet access services to customers reached by cable facilities. The Commission’s order therefore excludes EarthLink and other ISPs that are not affiliated with a cable company from a substantial portion of the large and growing broadband Internet access market. Viewed from the perspective of the consumer, the Commission’s ruling that the cable-based telecommunications underlying Internet access service is not a “telecommunications service” means that the vast majority of consumers today have access to only one cable-based Internet provider – the cable company itself.

The second and third questions presented relate to the first. In addition to finding generally that the telecommunications underlying Internet access service provided over cable facilities is not a

“telecommunications service,” the Commission also held specifically that any “stand-alone” transmission service offered to ISPs by AOL Time Warner under order of the Federal Trade Commission would be classified as “private carriage” rather than common carriage. Excerpt at 0142. The lawfulness of that decision constitutes the second issue presented.

The third issue presented involves the Commission’s “waiver” of the requirements mandated by its 1980 order in the *Computer II* proceeding. Excerpt at 0137. The *Computer II* provision waived by the Commission requires that *all* providers of “information services” (such as Internet access service) that use their own transmission networks to deliver those information services to the public must unbundle and sell that underlying transmission capability to competing information service providers on nondiscriminatory terms.<sup>5</sup> The Commission held that the *Computer II*

---

<sup>5</sup> *Computer II*, 77 F.C.C. 2d at 384, 475. The separation of the underlying transmission from the computer-enhanced portion of the service is commonly referred to as a requirement to “unbundle.” “Unbundling” as used in the *Computer II* proceeding is different from the “unbundling” mandated by section 251(c)(3) of the Act, 47 U.S.C. § 251(c)(3). *Computer II* unbundling refers to the requirement that facilities-based carriers that offer information services over their own transmission facilities must separate their transmission services from the computer processing (information service) functions that ride on those transmission services and must sell the transmission component to competing information service providers on non-discriminatory terms. Section 251(c)(3), in contrast, imposes upon incumbent local exchange carriers an obligation to sell separate network elements to competing telecommunications carriers (which may or may not

requirement does not apply to cable companies, but nevertheless went on to “waive” that requirement, on its own motion and without notice, to the extent that it might be found applicable to cable companies that also provide local exchange service. Excerpt at 0137.

## **VI. SUMMARY OF ARGUMENT.**

### **A. First Question Presented.**

The Commission held that Internet access service provided by cable companies is an “information service” that is by definition delivered “via telecommunications.” Excerpt at 0134-35. The Commission went on to hold, however, that the “telecommunications” by which that information service is by definition delivered is not a “telecommunications service.” Excerpt at 0135. The Commission’s determinations that Internet access service is an “information service” and that such service is delivered “via telecommunications” are correct. The Commission’s key holding, however, that such telecommunications does not constitute a “telecommunications service” within the meaning of section 3(46) of the Act, 47 U.S.C. §

---

also be information service providers). *Computer II* unbundling requirements apply to all facilities-based carriers that use their own transmission facilities to deliver information services; section 251(c)(3) applies only to incumbent local exchange carriers.

153(46), is wrong for three reasons, each of which constitutes an independent basis for reversing the Commission's Declaratory Ruling.

First, this Court has already held that the transmission underlying Internet access service provided by cable companies is a "telecommunications service" under the Act. In *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9<sup>th</sup> Cir. 2000), this Court stated that:

Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. *To the extent @ Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.*

*Id.* at 878 (emphasis added).

The second reason why the Commission's determination that the cable-based transmission underlying Internet access service is not a telecommunications service is wrong is that the Commission's interpretation conflicts with the plain language of the Act. The Commission correctly held that "Internet access service" is an "information service." Excerpt at 0134. EarthLink agrees with that holding because it is consistent with the definition of "information service," which the Act defines as "the offering of a capability for generating, acquiring, storing, transforming, processing,

retrieving, utilizing, or making available information *via telecommunications. . . .*” 47 U.S.C. § 153(20) (emphasis added). Up to this point – that Internet access service is an “information service” delivered “via telecommunications” – EarthLink and the Commission agree. It is at the next stage of the analysis, which asks whether the “telecommunications” here involved is also a “telecommunications service,” that EarthLink and the Commission disagree.

The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). Because the “information service” known as Internet access service by definition includes “telecommunications,” and because the cable companies that sell Internet access service are offering it “for a fee directly to the public,” those cable companies are by the plain language of the statute offering a “telecommunications service.” 47 U.S.C. § 153(46). The Commission’s analysis underlying its determination that the telecommunications component of cable-based Internet access service is not a “telecommunications service” disregarded the Congressional instruction to give no consideration to the nature of the facilities used and simply ignored

the “for a fee” and “to the public” prongs of the statutory definition of “telecommunications service.” Instead, the Commission reasoned that such telecommunications is not a telecommunications service because it is not offered on a “separate” or “stand-alone” basis. Excerpt at 0135-0139. The Commission’s interpretation, therefore, ignores the plain language of the Act and depends entirely on the insertion of additional words into the statute, something that the Commission has no authority to do.

Finally with respect to the first issue presented, the Commission has held for over twenty years that the transmission services used by facilities-based carriers to deliver enhanced services (now known as “information services”) to the public are common carrier services that those carriers must sell to other information service providers on a nondiscriminatory basis. *See In Re Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C. 2d 384 (1980); *on reconsideration*, Memorandum and Order, 84 F.C.C. 2d 50 (1980) *and* Memorandum and Order on Further Reconsideration, 88 F.C.C. 2d 512 (1981), *aff’d sub nom. Computer and Communications Indus. Ass’n v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (“*Computer II*”). The *Computer II* requirement that information service providers using their own transmission facilities must sell that transmission

capacity to competing information service providers is based on the common carrier authority in Title II of the Act. *Id.* at 435.

*Computer II* established a regulatory regime in which computer processing services accessed over communications facilities are viewed as a combination of two components: “basic services” and “enhanced services.” A “basic service” is “one that is limited to the common carrier offering of transmission capacity for the movement of information.” *Computer II*, 77 F.C.C. 2d at 419. An “enhanced service” is “any offering over the telecommunications network which is more than a basic transmission service.” *Id.* at 420. Even though the two services are combined in a single-price package when they are sold to the customer, the basic and enhanced components remain distinct for the purposes of the Act. More specifically, basic services (now “telecommunications services”) are regulated under the common carrier provisions of Title II of the Act, while enhanced services (now “information services”) are not. *See Computer and Communications Indus. Ass’n v. F.C.C.*, 693 F.2d 198, 205 (D.C. Cir. 1982).

*Computer II* is not merely a longstanding and often reaffirmed Commission precedent. Rather, the Commission has held that Congress adopted the *Computer II* regime when it enacted the Telecommunications Act of 1996, P.L. 104-104 (the “1996 Act”). Congress incorporated the

*Computer II* regime in the Act in 1996 by adding definitions for “information service” and “telecommunications service.” “Enhanced services” as described in *Computer II* are now “information services” in the language of the Act, and “basic services” have become “telecommunications services.” See *In Re Federal-State Joint Board on Universal Service*, Report To Congress, 13 F.C.C.R 11501, 11511 (1998); see also Declaratory Ruling at ¶34 n.139, Excerpt at 0132. In addition to updating the terms originally adopted by the Commission in its 1980 *Computer II* decision, Congress made it clear that the *Computer II* structure applies to all telecommunications services, “regardless of the facilities used.” 47 U.S.C. § 153(46). That means that a service that otherwise meets the definition of a “telecommunications service” shall be so classified without regard to whether that service is delivered using a telephone wire, a cable wire, or some other transmission medium. Accordingly, the Commission’s attempt to exempt cable companies that use their own facilities to deliver Internet access service to the public from the *Computer II* rules on the grounds that those rules do not apply to transmission over cable facilities directly contradicts longstanding Commission precedent that is now incorporated in the plain language of the Act.

B. Second Question Presented.

The second question presented addresses the Commission's holding that AOL Time Warner provides telecommunications on a private carriage basis rather than a common carriage basis to the extent that it sells transmission directly to ISPs (as it does to EarthLink under orders issued by the Federal Trade Commission and the FCC). The private carrier ruling is refuted by the answer to the first question presented, because the common carrier telecommunications services that AOL Time Warner provides to its residential customers in conjunction with cable-based Internet access service are the same telecommunications services that it provides to ISPs under Federal Trade Commission and FCC orders stemming from the merger of America Online ("AOL") and Time Warner. Those identical services cannot at the same time be both private carriage and common carriage. They are instead uniformly common carriage. In addition, the Commission itself admits that the record contains insufficient factual information upon which to make the "private carriage" determination that it nonetheless goes on to make. Excerpt at 0142.

C. Third Question Presented.

The Commission's purported waiver of the *Computer II* unbundling rules for certain cable companies is invalid for at least three reasons. First,

as Commissioner Copps notes in his dissent, the waiver was issued without any notice or opportunity for comment, in contravention of the Administrative Procedure Act. *See* Excerpt at 0183. Second, the waiver is an impermissible attempt to forbear from applying statutory obligations without complying with the specific forbearance procedures and criteria applicable to telecommunications services as set forth in section 10 of the Act, 47 U.S.C. § 160. Third, the effect of and the stated reason for the waiver fail to satisfy the legal standard for waivers set forth in applicable Commission and judicial precedent.

## **VII. ARGUMENT.**

EarthLink addresses the questions presented in the order set forth above.

**A. The Commission Was Wrong As A Matter Of Law When It Held That Cable Modem Service Does Not Include A Telecommunications Service.**

**1. This Court Has Already Ruled that Companies that Provide Internet Access Service Over Their Own Cable Facilities Are Providing Two Services, One of Which Is a “Telecommunications Service.”**

The first question presented is a pure exercise in statutory construction: Is the “telecommunications” over which cable companies deliver the “information service” of Internet access a “telecommunications

service” under section 3(46) the Act, 47 U.S.C. § 153(46)? The court would ordinarily apply the familiar two-part test announced in *Chevron USA v. N.R.D.C.*, 467 U.S. 837 (1984), to the Commission’s interpretation of the statutory term “telecommunications service.” Under that framework, the court asks first “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842. Only if the court determines that Congress has not directly addressed the question at issue does it then ask “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. As EarthLink discusses in Part VII A.2, *infra*, Congress has directly addressed the precise question at issue and has decided it differently than has the Commission. Thus, the FCC’s assertion of statutory ambiguity notwithstanding, no deference is due its interpretation.<sup>6</sup>

---

<sup>6</sup> The Commission asserts at paragraph 32 of the Declaratory Ruling that “[t]he Communications Act does not clearly indicate how cable modem service should be classified or regulated; the relevant statutory provisions do not yield easy or obvious answers to the questions at hand. . . .” Excerpt at 0131. The Commission never identifies what it is about the statute that is unclear or ambiguous. To the extent that the Commission “has ignored the plain text and has attempted to manufacture an ambiguity in order to obtain an increased level of judicial deference,” that tactic should be rejected. *City of Dallas v. F.C.C.*, 165 F.3d 341, 353 (5<sup>th</sup> Cir. 1999). To the extent that the Commission’s statement that “[t]he Communications Act does not clearly indicate how cable modem service should be classified” constitutes an argument that the statute must specifically refer to “cable modem service” or some equivalent in order to apply to that service, that argument is also without merit. “Merely because a statute’s plain language does not specify particular entities that fall under its definition, does not mean that the statute

This Court's decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9<sup>th</sup> Cir. 2000), on the precise statutory definition issue here presented also deprives the Commission of entitlement to deference. "Once we have determined a statute's clear meaning," the United States Supreme Court has held, "we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus. v. Primary Steel*, 497 U.S. 116, 131 (1990); *see also Lechmere v. N.L.R.B.*, 502 U.S. 527, 536-37 (1992); *Neal v. U.S.*, 516 U.S. 284, 295 (1996). This Court has adopted the same approach:

We do not, however, explicitly apply the principles of deference to questions already controlled by circuit precedent, because a panel may not reconsider the correctness of an earlier panel's decisions, *see Bonin v. Vasquez*, 999 F.2d 425, 428 (9<sup>th</sup> Cir. 1993) "unless an en banc decision, Supreme Court decision, or subsequent legislation undermines [that] decision[.]" *Visness v. Contra Costa County (In re Visness)*, 57 F.3d 775, 778 (9<sup>th</sup> Cir. 1995) (quoting *United States v. Washington*, 872 F. 2d 874, 880 (9<sup>th</sup> Cir. 1989) (internal quotations omitted).

*Ladha v. INS*, 215 F.3d 889, 896 (9<sup>th</sup> Cir. 2000) (brackets and notations in original).

---

is ambiguous as to all those who do fall under it." *Royal Foods Co. v. RJR Holdings Inc.*, 252 F.3d 1102, 1107 n.6 (9<sup>th</sup> Cir. 2001), citing *United States v. Monsanto*, 491 U.S. 600 (1989).

In *City of Portland*, this Court held that when a cable operator offers an Internet access service over its cable facilities, it is providing two services: an unregulated “information service” and a regulated “telecommunications service:”

Like other ISPs, @Home consists of two elements: a “pipeline” (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. *To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.*

216 F.3d. at 878 (emphasis added). That holding is in direct conflict with the Commission’s holding that “[c]able modem service is not itself and *does not include an offering of telecommunications service to subscribers.*” Excerpt at 0135 (emphasis added).

The Commission mentions *City of Portland* in its Declaratory Ruling, Excerpt at 0143, but does not make any serious argument that the case is not controlling. Instead, the Commission nips around the edges of the decision, suggesting, without saying so, that *City of Portland* should not apply here. For example, the Commission claims that this Court in *City of Portland* was addressing a much narrower issue:

While we are considering the broad issue of the appropriate national framework for the regulation of cable modem service, the *Portland*

court considered a much narrower issue – whether a local franchising authority, whose authority was limited to cable service, had the authority to condition its approval of a cable operator’s merger on the operator’s grant of multiple ISP access.

*Id.* (footnote omitted). The Commission confuses the context in which the Court considered the definitional issue with the nature of the issue itself. In fact, the primary issue that this Court decided in *City of Portland* – whether cable-based Internet access service includes a telecommunications service when a single entity provides both the pipeline element and the Internet connectivity element – is *precisely* the same issue before the Court in this case. Under this Court’s rule that one panel “may not reconsider the correctness of an earlier panel’s decisions,” *Ladha v. INS*, 215 F.3d at 896, *City of Portland* controls and the Commission’s declaration that cable modem service “does not include an offering of telecommunications service to subscribers” must be set aside on that ground alone.

The Commission also suggests – again without quite saying so – that this Court’s *City of Portland* holding regarding the telecommunications service component of cable-based Internet service was *obiter dictum*:

The Ninth Circuit could have resolved the narrow question before it by finding that cable modem service is not a cable service. Nevertheless, in the passage quoted above the court concluded that because there is a “telecommunications” component involved in providing cable modem service, a separate “telecommunications service” is being offered within the meaning of section 3(46) of the Act.

Excerpt at 0143-44 (footnote omitted). In fact, the Court in *City of Portland* determined that, in order to answer the question before it, “we *must* determine how the Communications Act defines @Home.” *City of Portland*, 216 F.3d at 877 (emphasis added). That the Court itself determined that it was necessary to decide how the Act classified the components of cable-based Internet access service defeats the assertion that its holding was *dictum*. That the inquiry was necessary is emphasized by the fact that AT&T challenged the city’s “open access” provision on the grounds that it violated section 621(b)(3) of the Act, 47 U.S.C. § 541(b)(3). That section prohibits local cable franchising authorities from placing restrictions or requirements on cable companies with respect to “telecommunications services” or “telecommunications facilities” that such companies might offer or employ. The Court decided the case on the basis that “subsection 541(b)(3) prohibits a franchising authority from regulating cable broadband Internet access, because the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service.” *City of Portland*, 216 F.3d at 880. Accordingly, the very applicability of the section at issue turned on the question of whether the cable transmission services were “telecommunications services.” It would emphatically *not* have been enough, contrary to the Commission’s claim, for the Court to have merely

determined that the services were not “cable services” within the meaning of the Act.<sup>7</sup>

The Commission’s final attempt to cast doubt on *City of Portland* consists of its assertion that “[t]he Ninth Circuit did not have the benefit of briefing by the parties or the Commission on this issue and the developing law in this area.” Excerpt at 0144. This assertion is misplaced for two reasons.

First, as the court noted, “the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us. Thus, we are not presented with a case involving potential deference to an administrative agency’s statutory construction pursuant to the *Chevron* doctrine.” *City of Portland*, 216 F.3d at 876. That the Commission had the chance, but chose not to share its thoughts with the court, is no reason for the court now to reconsider – quite the contrary. By the Commission’s own admission, “the issue of what, if any, regulatory treatment should be applied to cable modem service dates back to at least 1998. . . .” Excerpt at 0112. After *City of*

---

<sup>7</sup> EarthLink anticipates that some parties and intervenors will ask the Court to set aside the Commission’s determination that cable modem service is not a “cable service” within the meaning of section 602(6) of the Act, 47 U.S.C. § 522(6). *City of Portland* also controls on this issue. 216 F.3d at 876, 877. For the reasons stated there and in the Declaratory Ruling, Excerpt at 0145-0150, EarthLink supports the Commission’s determination that cable modem service is not a “cable service.”

*Portland* was decided, it took the Commission another year and a half to issue the Declaratory Ruling. Given the Commission's dogged avoidance of the simple statutory question here at issue, it is at best unseemly for the Commission now to suggest that this Court has somehow jumped the gun.

Second, the fact that neither AT&T (because to have done so would have subjected it to common carrier regulation) nor the City of Portland (because to have done so would have placed it within the prohibitions of 47 U.S.C. § 541(b)) chose to brief the "telecommunications service" issue has no bearing on the binding nature of the Court's earlier decision. The parties – and the Commission as amicus curiae – all made the tactical decision that they would try to obtain a favorable ruling without addressing the most obvious issue in their case. For the Commission to suggest that the Court's refusal to sanction the *City of Portland* litigants' failed strategy of avoidance should lead here to a reconsideration of the Court's earlier decision is without legal justification.

For all of the foregoing reasons, *City of Portland* requires that the Commission's holding that cable modem service does not include a telecommunications service must be reversed.

**2. The Plain Language of the Communications Act Defines the Transmission Underlying Internet Access Service Offered to the Public for a Fee as a “Telecommunications Service.”**

*City of Portland* controls this case. Even absent that controlling authority, however, the plain language of the Act mandates that the transmission service underlying Internet access service offered to the public for a fee over cable facilities (like the transmission service underlying Internet access service using other transmission facilities) is a “telecommunications service.” This case is one in which “Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. v. N.R.D.C.*, 467 U.S. 837, 842 (1984). Therefore, no deference is due the Commission’s interpretation. Specifically, Congress addressed the proper statutory classification of the transmission services underlying Internet access service through the definitions found in section 3 of the Act, 47 U.S.C. § 153.

The relevant definitions are those of “information service” and “telecommunications service.” The Act defines “information service” as follows:

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of

any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20).

The Commission held below that “cable modem service” is an “information service” under the Act:<sup>8</sup>

E-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and the DNS are applications that are commonly associated with Internet access service. Each of these applications encompasses the capability for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” *Taken together, they constitute an information service, as defined in the Act.* Consistent with the analysis in the Universal Service Report, we conclude that the classification of cable modem service turns on the nature of the functions that the end user is offered. We find that cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications. As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user’s World Wide Web presence, and the DNS. *Accordingly, we find that cable modem service, an Internet access service, is an information service.*

Excerpt at 0134 (emphasis added).

EarthLink agrees with the Commission that the “Internet access service” function of cable modem service (i.e., that part of the service that

---

<sup>8</sup> The Commission defines “‘cable modem service’ to mean the complete retail offering that is provided to subscribers,” i.e., the capability to access the functionality of the Internet combined with the transmission over which the customer is connected to that capability. *See* Excerpt at 0131 n.135.

enables users to access interactive services on the Internet, *see City of Portland*, 261 F.3d at 877-878) is an “information service” within the meaning of the Act. EarthLink also agrees with the Commission that, “[c]onsistent with the statutory definition of information service, cable modem service provides the capabilities described above ‘via telecommunications.’” Excerpt at 0135. Where EarthLink and the Commission part ways is at the next stage in the analysis, i.e., whether the “telecommunications” used by cable facility operators (or any other facility operator) to offer “information services” to the public for a fee constitutes a “telecommunications service” under the Act.<sup>9</sup> The Commission concluded that the “telecommunications” here involved is not a “telecommunications service”:

*Cable modem service is not itself and does not include an offering of telecommunications service to subscribers. We disagree with commenters that urge us to find a telecommunications service inherent in the provision of cable modem service. Consistent with the statutory definition of information service, cable modem service provides the capabilities described above “via telecommunications.” That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.*

---

<sup>9</sup> “Telecommunications” is also defined in section 3 of the Act. *See* 47 U.S.C. § 153(43). The full text of the definition is set forth in the Addendum.

As stated above, the Act distinguishes “telecommunications” from “telecommunications service.” The Commission has previously recognized that “[a]ll information services require the use of telecommunications to connect customers to the computers or other processors that are capable of generating, storing, or manipulation information.” Although the transmission of information to and from these computers may constitute “telecommunications,” that transmission is not necessarily a *separate* “telecommunications service.” We are not aware of any cable modem service provider that has made a *stand-alone* offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.”

*Id.* (footnotes omitted) (emphasis added).

The Act defines “telecommunications service” as follows:

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C. § 153(46).

The Commission’s analysis is perhaps most remarkable for the fact that it does not even attempt to address the two factors that determine when “telecommunications” is also a “telecommunications service,” i.e., whether the telecommunications is offered “*for a fee directly to the public. . . .*” *Id.* (emphasis added). Nor does the Commission acknowledge that EarthLink submitted uncontroverted evidence demonstrating that Internet access services are being offered by all major cable companies directly to the public at standard rates. In addition, the Declaratory Ruling ignores the detailed

legal argument offered by EarthLink and others applying the definition of “telecommunications service” to cable modem service. *See, e.g.*, EarthLink Comments at 24-31, Excerpt at 0026-0033; *see also* EarthLink November 8, 2001, *Ex Parte* Letter at 10, Excerpt at 0108. Neither the Commission nor any party has questioned that the services at issue are offered “for a fee directly to the public.” Nevertheless, the Commission has refused to address the obvious implication of that fact, i.e., that the “telecommunications” component of cable modem service therefore fits perfectly into the definition of “telecommunications service.” The Commission’s complete failure to apply or even acknowledge the clear two-part statutory definition of “telecommunications service” renders its conclusion legally insupportable.<sup>10</sup> *See Bell Atlantic Tel. Cos. v. F.C.C.*, 206 F.3d 1, 9 (D.C. Cir. 2000) (failure of FCC to explain application of statutory terms is independent ground for vacating ruling).

What the Commission did say is as damaging to its position as what it did not say. Unable to make the Act’s definition of “telecommunications service” fit its purpose, the Commission rewrote that definition by adding words of qualification. Specifically, the sole basis offered by the

---

<sup>10</sup> As is discussed *infra* in section VII.3.b., the Commission’s interpretation also renders meaningless the Congressional command that the definition applies “regardless of the facilities used.” 47 U.S.C. 153(46).

Commission for its holding that the telecommunications here involved is not a telecommunications service is that such telecommunications is not offered “separately” from the information service of Internet access. *See e.g.*, Excerpt at 0135. The Commission succinctly summarized its position in paragraph 40 of the Declaratory Ruling: “Although the transmission of information to and from these computers may constitute ‘telecommunications,’ that transmission is not necessarily a *separate* ‘telecommunications service.’ We are not aware of any cable modem service provider that has made a *stand-alone* offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available to the public.” *Id.*

The most fundamental problem with the Commission’s analysis is that it relies entirely on words that are not in the statute. Specifically, the Commission reads the definition of “telecommunications service” as requiring the existence of a “separate” or “stand-alone” offering of telecommunications to the public for a fee. *Id.* These words do not appear in the definition of “telecommunications service,” and the Commission has no power to add them. *See Vincent v. Apfel*, 191 F.3d 1143, 1148 (9<sup>th</sup> Cir. 1999) (“no justification for adding limiting language to a clear and unambiguous statute and regulation”); *see also United States v. Calamaro*,

354 U.S. 351, 359 (1957) (agency cannot add to the statute “something which is not there”). The statutory definition of “telecommunications service” simply does not require that the telecommunications involved (which the Commission admits is present) must be provided on a “stand-alone” or “separate” basis, and the Commission is without authority to add such a requirement. Inasmuch as the Commission’s reading of the Act depends entirely on the insertion of those qualifying words, that reading must be rejected.<sup>11</sup>

---

<sup>11</sup> That Congress did not intend “telecommunications service” to include only that telecommunications that is offered to the public for a fee on a “separate” basis is reinforced by the fact that Congress has demonstrated that it knows how to impose such a requirement when it so desires. The definition of “telephone toll service,” found at section 3(48) of the Act (47 U.S.C. § 153(48)), states that such service is “telephone service between stations in different exchange areas *for which there is made a separate charge* not included in contracts with subscribers for exchange service.” *Id.* (emphasis added). Inasmuch as the Commission’s Declaratory Ruling hinges on the fact that cable companies bundle transmission and information services in a single-price offering, Congressional designation of such bundling as significant in the definition of one term (“telephone toll service”) indicates that bundling is not significant where the definition of a different term (“telecommunications service”) makes no mention of a separate charge.

**3. The Commission's Holding that Cable Modem Service Does Not Include a Telecommunications Service Contradicts Twenty Years of Commission Precedent – Precedent that the Commission Has Held Congress Adopted in the Telecommunications Act of 1996.**

The Commission's holding that cable modem service does not include a telecommunications service must be reversed on the grounds that it conflicts with the plain meaning of the statute as derived from both the unambiguous language of the Act and this Court's decision in *City of Portland*. Even if the Act were not clear on its face, however, the Commission has held for over twenty years that facilities-based carriers cannot escape otherwise applicable common carrier regulation of transmission services by bundling those services with unregulated information services. The Commission adopted that bedrock principle in its 1980 *Computer II* decision, 77 F.C.C. 2d 384, and had never strayed from it until the Declaratory Order. Moreover, since the passage of the Telecommunications Act of 1996, the Commission has held on multiple occasions (most recently in the ruling under review) that Congress incorporated the *Computer II* regulatory regime into the Act when it amended the Act in 1996. *See* Excerpt at 0132 n.139. Despite this unbroken line of Commission decisions and the adoption by Congress of the *Computer*

*II* framework, the Commission attempts to explain its refusal to apply the *Computer II* rules to cable modem service by stating simply that “[t]he Commission has never before applied *Computer II* to information services offered over cable facilities.” Excerpt at 0137.

In order to understand how *Computer II* relates to the proper application of the statutory term “telecommunications service” to the transmission component of cable modem service, it is necessary first to examine the precedent that the Commission has here ignored and second to examine how that precedent was incorporated into the Act through the Telecommunications Act of 1996.

a. The Commission’s precedent.

Until the Declaratory Ruling, the Commission had consistently held that where facilities-based carriers provide information services to the public over their own networks, the transmission underlying those information services is a common carrier service (“telecommunications service”) that the carrier must sell to others on non-discriminatory terms and conditions. That position has its genesis in the *Computer Inquires*, to which the Commission makes reference in the Declaratory Ruling. Excerpt at 0132 n. 139. The Commission makes reference especially to its decisions in the “*Second Computer Inquiry*,” referenced in the Declaratory Ruling and here as

*“Computer II.” Computer II* enunciated a regulatory framework under which computer services that are delivered over telecommunications facilities are divided into two components: “basic services” and “enhanced services.” The Commission defined a “basic transmission service” as “one that is limited to the common carrier offering of transmission capacity for the movement of information.” *Computer II*, 77 F.C.C. 2d at 419. An “enhanced service” was defined as “any offering over the telecommunications network which is more than a basic transmission service.” *Id.* at 420.

*Computer II* made it clear that carriers using their own transmission facilities to provide “enhanced services” (now called “information services”) must sell to competing information service providers on nondiscriminatory terms the transmission services (“basic services” in *Computer II* parlance -- now “telecommunications services”) over which those enhanced services are delivered:

“[A]n essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced service providers are dependent on the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered. Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are

utilized. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions."

*Computer II*, 77 F.C.C. 2d at 475.

Since its adoption of *Computer II*, the Commission has repeatedly reaffirmed its position that use of a common carrier transmission service to deliver an information service to the public does not change the regulatory classification of the transmission component as a common carrier telecommunications service. In 1988, for example, the Commission had this to say:

*Bell Atlantic seems to reason that because enhanced services are not common carrier services under Title II, the basic services that underlie enhanced services are somehow also not subject to Title II. We do not agree.* Enhanced services by definition are services "offered over common carrier transmission facilities." Since the *Computer II* regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.

*In Re Filing and Review of Open Network Architecture Plans*, Memorandum and Order, 4 F.C.C.R. 1, 141 (1988) (emphasis added).

Similarly, in 1995, a bureau of the Commission reaffirmed that the fact that a facilities-based carrier bundles a regulated "basic service" ("telecommunications service") with an "enhanced service" ("information service") does not change the regulated nature of the basic service:

We also reject AT&T's contention that the contamination theory applies to its frame relay service and renders its entire InterSpan service offering an enhanced service. To date, the Commission has not applied the contamination theory to the services of AT&T or any other facilities-based carrier. Indeed, the Commission rejected that alternative in Computer III and other proceedings.

\* \* \*

Moreover, application of the contamination theory to a facilities-based carrier such as AT&T would allow circumvention of the Computer II and Computer III basic-enhanced framework. *AT&T would be able to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result.*

*In Re Independent Data Communications Mfrs. Ass'n. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service; and Am. Tel. and Tel. Co. Petition for Declaratory Ruling That All IXC's Be Subject to the Commission's Decision on the IDCMA Petition,* Memorandum Opinion and Order, 10 F.C.C.R. 13717, 13723 (October 18, 1995) (hereinafter "*Frame Relay*") (emphasis added).<sup>12</sup>

---

<sup>12</sup> The "contamination theory" discussed in the quoted language refers to the rationale under which information service providers that do not own the transmission facilities over which they deliver their information services have been relieved of otherwise applicable common carrier obligations with respect to that underlying transmission. Such non-facilities-based information service providers were known as value-added-network service providers ("VANs"), see *Frame Relay* at 13718 n.6, in pre-1996 Act language. "Under the contamination theory, VANs that offer enhanced protocol processing services in conjunction with basic transmission services

The Declaratory Order cites no authority that indicates that the Commission has *ever* read the Act as requiring that a facilities-based carrier using its own transmission facilities to deliver information services to the public must also offer that transmission on a “stand-alone” basis before such transmission will be considered a common carrier telecommunications service, and EarthLink knows of no such authority.

- b. The Commission has held that Congress adopted the *Computer II* basic/enhanced framework when it enacted the Telecommunications Act of 1996.

The rules that the Commission adopted in *Computer II* have now been codified as part of the Act. The Commission has held that Congress adopted the basic service/enhanced service concepts when it enacted the Telecommunications Act of 1996:

The 1996 Act added or modified several of the definitions found in the Communications Act of 1934, including those that apply to “telecommunications,” “telecommunications service,”

---

have historically been treated as unregulated enhanced service providers. Under this theory, the enhanced component of their offerings is viewed as ‘contaminating’ the basic component, and as a result, the entire offering is considered enhanced.” *Frame Relay* at 13720. It is this doctrine, for example, that prevents non-facilities-based Internet service providers such as EarthLink from being treated as common carriers. If the contamination theory were adopted today for the first time, it would have to be done under the Commission’s section 10 (47 U.S.C. § 160) forbearance authority. As the language quoted above from *Frame Relay* demonstrates, the Commission has never applied the contamination theory to an entity that uses its own transmission facilities to deliver information services to customers.

“telecommunications carrier,” “information service,” “telephone exchange service,” and “local exchange carrier.” In section 623(b)(1) of the Appropriations Act, Congress directed us to review the Commission’s interpretation of these definitions, and to explain how those interpretations are consistent with the plain language of the 1996 Act. Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. *Specifically, we find that Congress intended the categories of “telecommunications service” and “information service” to parallel the definitions of “basic service” and “enhanced service” developed in our Computer II proceeding, and the definitions of “telecommunications” and “telecommunications service” developed in the Modification of Final Judgment breaking up the Bell system.*

*In the Matter of Federal-State Joint Board on Universal Service, Report To Congress, 13 F.C.C.R. 11501, 11511 (1998) (emphasis added); see also Declaratory Ruling at ¶ 34 n.139 (basic/enhanced distinction incorporated into 1996 Act). Excerpt at 0132.*

In adopting the *Computer II* basic/enhanced framework through the addition of definitions of “telecommunications service” and “information service,” Congress did more than merely update the terminology used to describe those services. Reflecting the reality that telecommunications services were being offered and would continue to be offered by cable companies and other businesses that had not historically participated in the market for those services, Congress made it clear that the way carriers were classified (and therefore regulated) did not depend on the nature of the facilities used to provide the service. Congress expressed this functional

approach by defining telecommunications service as the “offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used.*” 47 U.S.C. § 153(46) (emphasis added). Accordingly, when Congress codified *Computer II*, it expressly provided that those rules would apply to all facilities used to deliver information services to the public, including cable facilities.

- c. The basis on which the Commission attempts to distinguish *Computer II* and its progeny is precluded by the Act.

With the following terse statement the Commission dismisses all of its cases that hold that the facilities-based transmission service used to provide information services to the public remains a common carrier telecommunications service despite being combined with an information service:

These decisions are inapposite. In the cases relied upon by EarthLink and others, the providers of the information services in question were traditional wireline common carriers providing telecommunications services (e.g., telephony) separate from their provision of information services. *Computer II* required those common carriers also to offer on a stand-alone basis the transport underlying that information service. The Commission has never before applied *Computer II* to information services provided over cable facilities. Indeed, for more than twenty years, *Computer II* obligations have been applied exclusively to traditional wireline services and facilities.

Excerpt at 0137 (footnotes omitted).

“Generally, an agency must follow its own precedent or explain its reasons for refusing to do so in a particular case.” *McClaskey v. United States Dep’t of Energy*, 720 F.2d 583 (9<sup>th</sup> Cir. 1983), citing *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973). Here, the Commission simply states without explanation that it has never before applied the same rules to cable-based information service providers that it has applied to “traditional wireline” information service providers.

The short answer to the Commission’s explanation that *Computer II* does not apply here because the transmission at issue is carried over cable lines instead of telephone lines is that such a rationale is categorically foreclosed by the plain language of the Act, which defines “telecommunications service” functionally, “regardless of the facilities used.” 47 U.S.C. § 153(46). See *AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9<sup>th</sup> Cir. 2000) (“Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, ‘regardless of the facilities used.’”) (internal citations omitted). In other words, if the Commission wishes to treat functionally identical services offered by telephone companies and cable companies differently, it must do

so on some basis other than the nature of the facilities employed. Inasmuch as the Commission has offered no such permissible alternative basis for its holding here, however, the Commission's determination that *Computer II* does not compel common carrier treatment of the transmission underlying cable-based Internet access service must be reversed. *See Louisiana-Pacific Corp. v. N.L.R.B.*, 52 F.3d 255, 259 (9<sup>th</sup> Cir. 1995) (agency order must be upheld, if at all, on the same basis articulated by the agency).

The Commission's argument that *Computer II* and its progeny do not apply to cable facilities, but only to "traditional wireline" facilities, is "explained" in footnote 169 of the Declaratory Ruling. Excerpt at 0137. There the Commission states that, "[b]y 'wireline,' we refer to services offered over the infrastructure of traditional telephone networks." *Id.* This is no explanation at all. Nowhere in the Act or in any Commission regulation is there a definition of "traditional wireline common carrier," much less one that defines such entities as "traditional telephone" companies.

Without any hint of irony or self-consciousness, the Commission itself correctly observes in its discussion of the terms "information service," "telecommunications," and "telecommunications service" that "[n]one of the foregoing statutory definitions rests on the particular types of facilities

*used.*” Excerpt at 0133 (emphasis added). That statement is clearly consistent with the “regardless of the facilities used” language in the definition of telecommunications service, 47 U.S.C. § 153(46), but it is flatly inconsistent with the Commission’s holding that the application of *Computer II* depends upon the nature of the underlying transmission facilities.

Finally, even if the language of the Act did not foreclose the distinction the FCC draws between cable facilities and the “traditional wireline” facilities to which it seeks to limit the holding of *Computer II*, the Commission’s position would nonetheless be arbitrary because it constitutes an unexplained and unacknowledged departure from the position that it took earlier in this very proceeding. In the Notice of Inquiry that began this proceeding, the Commission quite clearly proceeded from the assumption that *Computer II* would apply to cable companies that provided information services if those cable companies were found to be common carriers:

*In the event that cable operators are found to be common carriers providing an information service, and therefore subject to the requirements stemming from the Computer Inquiries, should the Commission forebear from enforcing the requirement to unbundle basic services from enhanced?*

Excerpt at 0022 (emphasis added). The Commission’s categorical statement in the Declaratory Ruling that *Computer II* and its progeny simply do not

apply to information services delivered to the public over cable facilities neither acknowledges nor explains this about-face – a classic example of arbitrary decisionmaking. *See, e.g., Greater Boston Tel. Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“[a]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerable terse to the intolerably mute.”).

For each of the independent reasons given above, the Commission’s holding that the transmission component of cable modem service is not a telecommunications service must be reversed.

**B. The Commission’s Holding That AOL Time Warner Offers Transmission To ISPs On A Private Carriage Basis Is Contrary To Law And Unsupported By The Record.**

The second holding of the Declaratory Ruling that EarthLink challenges is the Commission’s finding that, to the extent that AOL Time Warner provides transmission to unaffiliated ISPs, it does so on a private carriage rather than a common carriage basis. The Commission’s own statement of its conclusion perhaps best illustrates why that conclusion cannot stand:

It is possible, however, that when EarthLink or other unaffiliated ISPs offer service to cable modem subscribers, they receive from AOL Time Warner an “input” that is a stand-alone transmission service, making the ISP an end-user of “telecommunications,” as that term is defined in the Act. *The record does not contain sufficient facts by which to make that determination.* To the extent that AOL Time Warner is providing a stand-alone telecommunications offering to EarthLink or other ISPs, we conclude that the offering would be a private carrier service and not a common carrier service, because the record indicates that AOL Time Warner determines on an individual basis whether to deal with particular ISPs and on what terms to do so.

Excerpt at 0141-0142 (emphasis added).

In order for its decision to be upheld, the agency “must articulate a rational connection between the facts found and conclusions made.” *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1180 (9<sup>th</sup> Cir. 2000). If the Commission does not know whether AOL Time Warner in fact provides telecommunications to unaffiliated ISPs, or on what terms, it has no basis to determine that such transmission is offered on a private carriage basis.

Commissioner Copps pointed out this logical flaw in his dissent:

Next, the Commission addresses the situation in which a cable operator offers its cable modem service as an input provided to an unaffiliated ISP. Although the decision concludes that the record provides insufficient information to determine whether cable operators are offering pure transmission services to ISPs, the majority determines – with scant analysis – that it expects that any cable operators that offer pure telecommunications in the future would be offering only private carriage. Doesn’t insufficient information mean that the Commission should refrain from broad pronouncements until it can acquire the necessary data?

Excerpt at 0183.

The inquiry into the common carrier status of a service provider is inherently a factual one, and the lack of any relevant facts in the record regarding the service at issue necessarily undermines the Commission's private carriage finding. *See National Ass'n of Regulatory Util. Comms. v. F.C.C.*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("Nor is it essential that there be a statutory or other legal commandment to serve indiscriminately; *it is the practice of such indifferent service that confers common carrier status.*") (emphasis added) ("*NARUC IP*"). The Commission itself properly notes that "[t]he Commission and courts have long distinguished between common carriage and private carriage *by examining the particular service at issue.*" Excerpt at 0142 (footnotes omitted) (emphasis added).<sup>13</sup>

The Commission states that "[t]he record indicates that AOL Time Warner is determining on an individual basis whether to deal with particular ISPs and is in each case deciding the terms on which it will deal with any

---

<sup>13</sup> EarthLink notes that the determination of who is and who is not a common carrier is an area in which the courts have afforded little deference to the Commission. The court in a seminal case on communications common carriers put it this way: "The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. *A particular system is a common carrier by virtue of its functions*, rather than because it is declared to be so." *National Ass'n of Regulatory Util. Comms. v. F.C.C.*, 525 F.2d 630, 644 (D.C. Cir. 1976) (emphasis added) ("*NARUC I*").

particular ISP.” *Id.* (footnote omitted). In footnote 209, which accompanies the immediately preceding quoted passage, the Commission cites to paragraphs 52-54 as support for the assertion that AOL Time Warner “is determining on an individual basis whether to deal with particular ISPs. . . .” As noted above, it is paragraph 54 that contains the Commission’s conclusion that “[t]he record does not contain sufficient facts to” determine the nature of the service at issue. *Id.*<sup>14</sup> Thus, the Commission’s circle of citations begins and ends with the same conclusion – that there is no record evidence upon which to base the private carriage finding.

Even if the Commission’s private carriage ruling were not facially invalid for lack of a factual basis, it must be set aside because it ignores the fact, discussed in Part A, *supra*, that cable companies that sell mass market cable-based Internet access services over their own facilities are providing a

---

<sup>14</sup> Paragraph 52 of the Declaratory Ruling does include recitations of a number of assertions made by AOL Time Warner regarding the nature of its agreement with EarthLink, an agreement that AOL Time Warner executed under order of the Federal Trade Commission. *See* Excerpt at 0140 n.194 and accompanying text (referring to the FTC order). Although EarthLink agreed to waive the confidentiality provision included in the AOL Time Warner agreement to allow the Commission to examine the terms of that agreement, to EarthLink’s knowledge the Commission never asked AOL Time Warner to do the same, and the Commission never reviewed the agreement. In any event, the agreement is not in the record, and the AOL Time Warner representations regarding the contents of that and other alleged agreements as recited by the Commission in paragraph 52 of the Declaratory Ruling (Excerpt at 0140-0141) have nothing to do with the private carriage/common carriage analysis.

“telecommunications service,” i.e., a common carrier transmission service. That transmission service is the same service whether it is provided by the cable company directly to Internet service subscribers or to ISPs. Thus, even if it were true (which it is not) that AOL Time Warner “is dealing with each ISP on an individualized basis,” Excerpt at 0142, that fact would merely prove that AOL Time Warner is impermissibly discriminating among customers with respect to a common carrier service. *See, e.g., Southwestern Bell Tel. Co. v. F.C.C.*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (“carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with its customers”).

EarthLink argued below that it is irrelevant how cable companies might try to structure their future arrangements for selling transmission to ISPs given that those cable companies are already selling the same transmission to millions of consumers on a common carrier basis as the delivery vehicle for the cable companies’ own Internet access service:

[I]t is simply irrelevant to the common carrier analysis that cable companies might seek to negotiate individual terms with ISPs if and when those cable companies decide to offer the transmission used for cable modem service as a stand alone service sold to ISPs. The plain fact is that every major cable company is today holding itself out to millions of individual users to whom it provides its facilities-based Internet access service on standard terms and conditions. As discussed above, that offering includes both the information service of Internet access and the telecommunications service over which that information service rides. Under the standard for common carriage

set forth in *National Ass'n of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630 (“*NARUC I*”), holding oneself out indiscriminately to the public to provide a service that permits users to transmit intelligence of their own design and choosing renders one a communications common carrier. . . . Since the cable companies are already actively offering “cable modem service” to millions of people on a common carrier basis, they cannot avoid their common carrier obligations to ISPs simply by refusing to serve them or by negotiating different terms.

Excerpt at 0107-0108.

The Declaratory Ruling does not even address this argument, an argument that makes the Commission’s speculation about the relationships between AOL Time Warner and other ISPs irrelevant. Although it is certainly the case that a single entity may be a common carrier with respect to one service and a private carrier with respect to another, *NARUC II*, 533 F.2d at 608, EarthLink is aware of no authority that holds that a single entity may be both a common carrier and a private carrier with respect to the *same* service. Such a result would be counter to the entire concept of common carriage, the fundamental tenet of which is that all subscribers to a particular service may access it on terms that are not unreasonably discriminatory. *See* 47 U.S.C. § 202. The Commission would take prohibited discrimination and turn it into “private carriage.” This the Commission may not do.

**C. The Commission's Waiver Of The *Computer II* Unbundling And Nondiscrimination Requirements For Cable Companies That Also Provide Local Exchange Service Was Unlawful.**

The FCC offers one final way to avoid regulating the transmission component of cable modem service. Just in case the Commission is wrong about whether cable modem service includes a telecommunications service, and just in case it is wrong about whether *Computer II* applies, and if it is wrong about cable-based transmission being private carriage, it simply “waives” the *Computer II* requirements for those cable companies that also offer local exchange service:

Even if *Computer II* were to apply, however, we waive on our own motion the requirements of *Computer II* in situations where the cable operator additionally offers local exchange service.

Excerpt at 0137. This ruling must be set aside for at least four independent reasons.

1. The Authority Cited by the Commission Is by Its Own Terms Inadequate to Support the Waiver.

The Commission cites 47 C.F.R. §1.3 as its authority for waiving the *Computer II* requirements. Excerpt at 0138 n. 174. Section 1.3 states in its entirety:

*The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any*

provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

47 C.F.R. §1.3 (emphasis added).

As discussed above, the Commission has held on several occasions (including in this proceeding) that the *Computer II* rules that are purportedly waived here have been incorporated by Congress into the Act through the adoption in 1996 of the defined terms “telecommunications service” and “information service.” *See supra* pp. 39-40. As such, *Computer II* is no longer merely a Commission regulation, and it is therefore no longer a “provision[] of this chapter” within the meaning of 47 C.F.R. § 1.3. Instead, the *Computer II* distinction between “basic” and “enhanced” service has been codified in the definitions of “telecommunications service” and “information service,” with the section 201 and 202 common carrier obligations attaching to the telecommunications service component of Internet access service. 47 U.S.C. §§ 153(46), 153(20), 201, 202. It is axiomatic that an agency must follow its own regulations. *See, e.g. Memorial, Inc. v. Harris*, 655 F.2d 905, 910-11 n.14 (9<sup>th</sup> Cir. 1980). By attempting to “waive” a statutory provision as opposed to a provision of the Commission’s own regulations, the Commission clearly steps beyond the boundaries that it has itself set for its waiver power.

2. The Commission Violated the Administrative Procedure Act and Its Own Regulations by Issuing the Waiver Without Notice and Without Providing an Opportunity for Public Comment.

Even if the Commission's waiver were not *ultra vires* because of its application to a statute as opposed to a regulation, it is unlawful because it was adopted without any notice to affected parties or any opportunity for comment. The waiver idea appeared for the first time in the Declaratory Ruling.

Commissioner Copps raised the lack of notice in his dissent, but the Commission chose to ignore the issue:

The Ruling seems uneasy with its own conclusions. Just in case we are wrong, and access requirements were to apply, *they are waived, on the Commission's own motion, with neither notice nor comment.*

Excerpt at 0183 (emphasis added).

The Commission's rule states that waivers are "subject to the provisions of the Administrative Procedure Act. . . ." 47 C.F.R. § 1.3. The rule does not specify which Administrative Procedure Act processes must be employed, and it is well settled as a general proposition that an agency has substantial discretion to proceed by either rulemaking or adjudication.<sup>15</sup> *See,*

---

<sup>15</sup> Where the Commission has no discretion, however, is on the issue of whether the Administrative Procedure Act applies at all to substantive determinations like the *Computer II* waiver at issue here. The Commission's

*e.g.*, *Chisholm v. F.C.C.*, 538 F.2d 349, 365 (D.C. Cir. 1976). For that reason, EarthLink does not take issue as such with the fact that the Commission chose to waive *Computer II* in a Declaratory Ruling, which is at least technically classified as an adjudicatory procedure. *See* 5 U.S.C. §554(e). Instead, EarthLink objects to the fact that the waiver was issued without any opportunity whatsoever for the affected parties to provide their views to the agency. This is not a case where the court must determine whether a minimal opportunity for public input satisfies the requirements of 5 U.S.C. § 554 and the Due Process clause of the United States Constitution. Because there was absolutely no indication that a waiver was being considered and therefore no opportunity for parties to address that possibility, the waiver fails to meet even the most lenient standard that may be available to the agency by law.

---

waiver of the *Computer II* rules would fundamentally change the effect of those rules by eliminating for all major cable companies the otherwise applicable requirement that they sell transmission to competing ISPs on nondiscriminatory terms. The waiver therefore qualifies as a substantive (rather than interpretative) rule. *See Alcaraz v. Block*, 746 F.2d 593, 613 (9<sup>th</sup> Cir. 1984) (“Substantive rules are those which effect a change in existing law or policy.”) (internal citations omitted); *see also Neighborhood TV Co. v. F.C.C.*, 742 F.2d 629, 637 (D.C. Cir. 1984) (“In determining whether a rule is substantive, we must look at its effect on those interests ultimately at stake in the agency proceeding.”) Here, the waiver would allow cable companies to refuse to provide their ISP competitors with transmission capability essential to those competitors’ ability to offer service. That is a substantive effect by any measure.

3. The Waiver Impermissibly Circumvents the Statutory Forbearance Procedures and Standards in Section 10 of the Communications Act.

Even if the waiver were not defective because it is *ultra vires* and was adopted without notice or opportunity for comment, it violates the substantive and procedural provisions set forth in section 10 the Act, 47 U.S.C. § 160. That section governs the Commission’s authority to forbear from applying the Act and the Commission’s regulations to telecommunications services and telecommunications carriers. It is firmly established that when Congress has provided a specific procedure for doing something, agencies cannot bypass that procedure. *See MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994) (agencies “are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”); *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990) (“Where Congress prescribes the form in which an agency may exercise its authority . . . we cannot elevate the goals of an agency’s actions, however reasonable, over that prescribed form.”); *Beverly Enters., Inc. v. Herman*, 119 F. Supp.2d 1, 11 (D.D.C. 2000) (“[i]t is not the province of this Court to authorize substitution of a potentially more effective method where Congress has provided for one in the statute.”); *see also In Re Sealed*

*Case*, 237 F.3d 657 (D.C. Cir. 2001); *PDK Labs v. Reno*, 134 F. Supp.2d 24, 35 (D.D.C. 2001).

In 1996, Congress added section 10 to the Act to provide the Commission with substantial authority to forbear from applying “any regulation or any provision...to a *telecommunications carrier* or *telecommunications service*.” 47 U.S.C. §160(a) (emphasis added). As discussed above, the transmission service underlying cable Internet access is a telecommunications service. The waived *Computer II* unbundling requirements by definition deal only with “basic services” -- what the Act now calls “telecommunications services.” *See Computer II*, 77 F.C.C. 2d at 429; *see also Universal Service Report To Congress*, 13 F.C.C.R. 11501, 11511. Because the *Computer II* unbundling requirements are grounded in the nondiscrimination provisions of Title II of the Act, which only apply to common carrier telecommunications services, section 10 applies by its clear terms to any Commission action to forbear from enforcing the *Computer II* requirements. Moreover, as discussed in detail above, the Commission itself has held that Congress has codified the *Computer II* regime in the Act. Thus, the Commission is attempting to “waive” provisions of the Act itself, a result that can only be obtained through the section 10 forbearance procedures.

The Commission's invocation of its regulatory waiver authority under 47 C.F.R. § 1.3 is made the more improper by the fact that the Commission has acknowledged in this very proceeding that section 10 controls the grant of any relief that the Commission may want to provide from the *Computer II* rules. When the Commission began the proceeding that led to the Declaratory Ruling, it clearly indicated that the section 10 forbearance procedure would apply if the Commission wished to release cable companies providing Internet access service from *Computer II* requirements in the event that those cable companies were deemed to be common carriers. In the Notice of Inquiry, the Commission asked:

In the event that cable operators are found to be common carriers providing an information service, and therefore subject to the requirements stemming from the *Computer Inquiries*, should the Commission forbear from enforcing the requirement to unbundle basic service from enhanced?"

Notice of Inquiry at ¶ 54, Excerpt at 0022. The Commission also recognized the applicability of section 10 when it proposed to use that section to avoid the impact of *City of Portland*. Declaratory Ruling at n. 219, Excerpt at 0144. It is unclear whether the Commission merely forgot about the Act's forbearance provisions and related requirements when it attempted to avoid application of *Computer II* by "waiver" in the Declaratory Ruling, or whether the Commission simply determined, for whatever reason, that it

preferred to use its own waiver procedure. Whatever the explanation, the substitution of a waiver for the statutorily mandated forbearance procedure is impermissible.

The section 10 requirements clearly state what the Commission must do before it forbears from enforcing a common carrier regulation – namely, it must make three specific determinations. Those determinations are that:

(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.

47 U.S.C. §160(a)(1)-(3).

The record is devoid of any indication that the Commission even acknowledged, much less applied, these required criteria. That the Commission did not undertake the required section 10 analysis before issuing the Declaratory Ruling is conclusively demonstrated by the fact that the Commission has requested comment in the contemporaneous NPRM on the appropriateness of section 10 forbearance from common carrier

regulation if cable modem service is held to include a telecommunications service. Excerpt at 0159.

In sum, the waiver exceeds the authority in the Commission's governing regulation and acts to circumvent entirely the mechanism that Congress prescribed for relieving common carriers of selected obligations under the Act. As such, the waiver is contrary to the Act and must be vacated.

4. The Waiver Does Not Meet the Standards Set by Commission and Judicial Precedent.

The Commission cites *Northeast Cellular Tel. Co. v. F.C.C.*, 897 F.2d 1164 (D.C. Cir. 1990), for the proposition that a waiver is appropriate when circumstances warrant deviation from the usual rule and when deviation would better serve the public interest. Excerpt at 0138 n.175. The Commission also cites *WAIT Radio v. F.C.C.*, 418 F.2d 1153 (D.C. Cir. 1969) for the proposition that a waiver is appropriate "where the particular facts would make strict compliance inconsistent with the public interest." Excerpt at 0138 n.174. The waiver here clearly fails these tests.

The Commission is not waiving the specific application of a rule that generally remains in effect. Instead, having declared by fiat that a rule (one that has been codified in the Act, no less) has no application at all to the

service at issue, the Commission then invokes its waiver authority to make sure that a segment of the industry thus deregulated does not become regulated again by virtue of its local exchange activities. As such, the Commission's action here turns the waiver analysis on its head. Waivers are properly used to allow deviations from the general rule where the deviation will, under special circumstances, further the purpose of the general rule as well or better than application of the rule itself. *See Northeast Cellular*, 897 F.2d at 1166. Here, the Commission has done away with the general rule (*Computer II*) through the various interpretations discussed in detail above, and now applies its waiver powers prophylactically to make sure that no party may be brought back within the coverage of the rule that has been discarded. Whatever one properly calls such a regulatory hodgepodge, it is not a permissible waiver under applicable authority.

### **VIII. CONCLUSION.**

After years of avoiding the issue, the Commission in the Declaratory Ruling finally held that there is no telecommunications service included when a cable company offers Internet access service the public for a fee over the cable company's own transmission facilities. In so holding, the Commission ignored the ruling of this court on precisely the same issue,

ignored the plain language of the Act, and ignored twenty years of precedent that the Commission itself admits has been codified in the Act by Congress. Not content with those holdings, the Commission hedged its bets by declaring that cable-based transmission services that one cable company might be selling to unaffiliated ISPs constitute private carriage rather than common carriage. The commission made this finding even as it held that it did not have enough information to do so. Finally, the Commission added a piece of twine to its belt and suspenders by “waiving” the requirements of *Computer II* in the event that its other holdings did not obtain the desired result.

For all of the reasons set forth herein, each and every challenged Commission holding is contrary to law and must be reversed. Because the issues presented can be answered conclusively by reference to the plain language of the statute, there is no need or purpose in remanding the matter to the Commission for further proceedings. Instead, EarthLink respectfully requests that the Court find that the offering of Internet access service to the public for a fee using a provider’s own transmission facilities includes a telecommunications service, regardless of the facilities used. EarthLink requests further that the Court set aside each of the challenged Commission rulings.

Respectfully submitted,

---

John W. Butler  
Earl W. Comstock  
Alison Macdonald  
SHER & BLACKWELL, LLP  
1850 M Street, N.W, Suite 900  
Washington, DC 20036  
(202) 463-2500  
Counsel for EarthLink, Inc.

David N. Baker  
Vice President for Law  
and Public Policy  
EarthLink, Inc.  
1375 Peachtree Street  
Atlanta, GA 30309

October 10, 2002