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VIA HAND DELIVERY

September 4, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

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

Re: *Ex Parte* Presentations - *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities* --CC Docket Nos. 02-33, 98-10, 95-20, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*--CC Docket No. 01-337

Dear Ms. Dortch:

On September 3, 2003, Dave Baker, Vice President for Law and Public Policy of EarthLink, Inc., and the undersigned met with Commissioner Michael Copps and Jennifer Rosenworcel, Legal Advisor to Commissioner Copps, and, separately, met with Commissioner Kathleen Abernathy and Matthew Brill, Senior Legal Advisor to Commissioner Abernathy, to discuss the above-referenced proceedings.

During these meetings, EarthLink discussed its position described in documents previously filed in the above-referenced dockets. EarthLink described its experience as a major independent Internet service provider (ISP) delivering broadband high speed Internet access to approximately one million consumers in the U.S., the majority of which are served using DSL. Demonstrating the importance of customer choice in DSL-based ISPs, EarthLink explained that it just won the J.D. Power and Associates Award for Highest Customer Satisfaction Among High-Speed Internet Service Providers for the second year in a row. A copy of the EarthLink press release is attached hereto and was provided to the Commissioners and to Ms. Rosenworcel. EarthLink also explained how independent ISPs add value to consumers' online experience by offering unique products and services such as EarthLink's spamBlocker.

EarthLink emphasized that ISPs rely on nondiscriminatory access to Bell Operating Company (BOC) networks and that it is critical for ISP competition to retain such principles. An FCC decision that does not uphold nondiscrimination would impede investment in broadband ISP and applications, which would be contrary to the continued deployment, adoption and quality of broadband Internet services.

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During the meeting with Commissioner Copps and Ms Rosenworcel, EarthLink discussed that BOC DSL services have been classified as Title II "telecommunications services" in FCC precedent and that this continues to be the appropriate classification under a *NARUC I* analysis EarthLink discussed that it and other companies are working on powerline communications as an alternative means of access, but it is not yet a viable market reality. EarthLink also discussed and provided a copy of the attached proposed ISP access rule of EarthLink, MCI, and AOL Time Warner (filed in the above-referenced dockets on May 1, 2003), which is consistent with the FCC's December 2002 SBC-ASI Forbearance Order EarthLink discussed the complex issues of cost allocation and enforcement that would arise with a shift of BOC advanced services from Title II to Title I authority. EarthLink urged that the cost allocation issues must be resolved to avoid serious cross subsidy of BOC unregulated interstate services by consumers of regulated services, and that the Commission should resolve the issue in a further notice before regulatory classification issues are resolved Further, EarthLink noted that it is untested whether the FCC could provide effective enforcement of potential Title I ISP safeguards using its Section 208 authority, which attaches only to Title II common carriers. With Ms. Rosenworcel, EarthLink discussed the data in the record on consumers with access to both cable and DSL, noted that roughly one-third of consumers have access, if at all, to one broadband platform, and that even a duopoly of providers does not make a competitive market, especially given the impediments of consumer switches from one platform to another

In addition, during the meeting with Commissioner Abernathy and Mr. Brill, EarthLink discussed the importance of ISP competition for the development of broadband applications, especially those competitive with the BOC's own services, irrespective of whether consumers have end user access to web sites EarthLink discussed that a transition without Title II nondiscrimination would jeopardize the competitive ISP market and add legal uncertainty for ISP investment in broadband services and applications. Further, EarthLink argued that BOCs can arrange private contracts with ISPs today for nonregulated services and use tariffed services as inputs, and that the EarthLink-BellSouth RBAN negotiation was not impeded or delayed by regulatory issues EarthLink also explained that BOC assertions that the *Computer Inquiry* rules are technically infeasible appear to be due to the BOCs' failure to use the efficiencies of integrated offerings permitted under *Computer III*; the BOCs offer no reasonable solution to this issue but, instead, wrongly insist on a total elimination of the *Computer Inquiry* framework. EarthLink also provided a copy of the attached coalition letter, separately filed on September 3rd, urging continued application of the Title II principles in these proceedings to sustain ISP access.

Pursuant to the Commission's Rules, eight copies of this letter/memorandum are being provided to you for inclusion in the public record in each of the above-captioned proceedings. Should you have any questions, please contact me

Sincerely,

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

CC Commissioner Michael Copps
Commissioner Kathleen Abernathy
Jessica Rosenworcel, Esq
Matthew Brill, Esq
Qualex

FOR IMMEDIATE RELEASE

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EARTHLINK HIGH SPEED INTERNET SERVICE RANKED HIGHEST IN CUSTOMER SATISFACTION BY J.D. POWER AND ASSOCIATES

EarthLink Garners Top Honors for Second Consecutive Year

ATLANTA, Aug. 5, 2003 — EarthLink (NASDAQ: ELNK), one of the nation's leading Internet service providers, today announced that its high-speed Internet service has been recognized by J.D. Power and Associates in its 2003 Internet Service Provider Residential Customer Satisfaction Study℠ with the highest ranking in customer satisfaction for the second year in a row.

"J.D. Power and Associates sets the standard for excellence and achievement, and being singled out for overall customer satisfaction for the second year in a row reinforces our commitment to provide the best Internet experience to EarthLink subscribers," said Karen Gough, executive vice president of marketing for EarthLink. "This honor will help to further differentiate our high-speed service, which continues to play a prominent role in EarthLink's overall growth strategy."

Consumers participating in the JD Power and Associates Internet Service Provider Residential Customer Satisfaction Study℠ rated both national and regional ISPs on seven different factors that comprise the overall customer satisfaction index. EarthLink's top position among broadband providers results from receiving the highest scores in the industry for customer service, e-mail services, cost of service, billing, image, and offerings and promotions.

As part of EarthLink's commitment to customer satisfaction, the company is aggressively rolling out new products and services to further extend its value proposition. These features, available to all EarthLink High Speed subscribers include: spamBlocker, which eliminates virtually 100 percent of all junk e-mail messages, and Pop-up Blocker ℠, which helps block annoying pop-up ads.

About EarthLink High Speed Internet

With more than 993,000 high-speed subscribers, EarthLink is one of the country's leading broadband Internet service providers. EarthLink is the only ISP to offer high-speed Internet access nationally through all three major broadband technologies: cable, DSL and two-way satellite. Ranging in price from just $39.95 - $49.95 per month, EarthLink offers a broadband option for every budget and need. For more information about this or other EarthLink high-speed products, please call 877-657-6895 or visit http://www.earthlink.net/home/broadband

About J.D. Power and Associates

Headquartered in Westlake Village, Calif., J.D. Power and Associates is an ISO 9001-registered global marketing information services firm operating in key business sectors including market research, forecasting, consulting, training and customer satisfaction. The firm's quality and satisfaction measurements are based on responses from millions of consumers annually.

About EarthLink

EarthLink is the Internet service provider (ISP) solution for an impatient world. Headquartered in Atlanta, EarthLink has earned a national reputation for outstanding customer service, its suite of online products and services, and is ranked Highest in Customer Satisfaction Among High-Speed ISPs, according to J.D. Power and Associates. EarthLink tied for the highest score among high-speed providers in the 2002 study. Serving approximately five million subscribers, EarthLink offers what every user should expect from their Internet experience: high-quality connectivity, minimal drop-offs and ISP-generated intrusions, and customizable features. Whether it's dial-up, high-speed, Web hosting, or wireless Internet service, EarthLink provides the tools that best let individuals use and enjoy the Internet on their own terms. Learn more about EarthLink by calling (800) EARTHLINK visiting EarthLink's Web site at www.earthlink.net

# # #

PROPOSAL TO STREAMLINE TITLE II REGULATION OF BOC ADVANCED SERVICES TO PROMOTE DIVERSE INFORMATION SERVICES

Proposed Title II ISP Access Rule: New Section 64.702(c)

§ 64 702(c) Each Bell Operating Company (including any affiliate)(hereinafter "BOC") shall provide access to its high-speed network to enhanced and information service providers ("ISPs") in the following manner

(1) Access to Transmission Services and Capabilities

Each BOC shall offer to all ISPs, whether affiliated or unaffiliated, all of its high-speed network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions Such offerings shall be separate from any other BOC services, including enhanced or information services.

(2) Transparency

(A) With respect to the rates, terms and conditions of the network transmission services and capabilities used by or made available to any ISP, each BOC shall

(i) File an interstate tariff with the Commission describing such rates, terms, and conditions, or

(ii) Post on its publicly available Internet website, in an accessible and easy to understand format, current and specific information describing such rates, terms and conditions

(B) If a BOC enters into an individual contract with an ISP for high-speed network transmission services and capabilities, then the BOC shall tariff or post on its publicly available Internet website, in an accessible and easy to understand format, the following information

(i) the term (including renewal option) of the contract;

(ii) a description of the high-speed network transmission services and capabilities provided under contract,

(iii) minimum volume commitments and price for each of the high-speed network transmission services and capabilities, as well as volume discounts, and

(iv) all other classifications, terms or practices affecting the contract rate

(C) Each BOC shall provide advance written notice to all purchasing ISPs, including notice by email, of any changes to the rates, terms, and conditions of any of the BOC's high-speed network transmission services and capabilities In the event the BOC seeks to discontinue any service or capability used by an ISP, such written notice shall be not less than 120 days prior to the proposed discontinuance

(3) Access to New Transmission Services and Capabilities

(A) An ISP may request in writing that a BOC provide access to new network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions.

(B) Where the ISP makes such a reasonable request, the BOC shall offer such access within 90 days, unless the Commission extends such time where the BOC, upon petition, demonstrates good cause.

(C) The BOC shall have 15 days to respond in writing to the requesting ISP, and such response shall describe either

(i) how the BOC will offer the requested access within 90 days of the request, or

(ii) the specific basis for the BOC's position that the requested access is not technically feasible or economically reasonable

(4) Definitions For purposes of this subsection (c).

"Transmission services and capabilities" shall include, without limitation, the BOC's transmission or telecommunications components or lines, switching and routing components, ordering and operations support systems ("OSS"), signaling, and other network functions or features

"High-speed network" means a network offering transmission rates of more than 200 Kbps in at least one direction

Proposed New Rule For Enforcement of ISP Access §1 737

§1 737 ISP Complaints Regarding Rule Section 64 702(c)

(a) Where a complaint alleges a violation of FCC Rule Section 64 702(c), the following additional procedures shall also apply

(1) In its Answer, the Defendant shall state clearly and precisely all information in its possession, including data compilations (e g , records of OSS configurations, ordering processes, data on specific orders or maintenance records, etc), and produce and serve on Complainant and the FCC all such information, including copies of all contracts or arrangements for high-speed network transmission services and capabilities, that may be relevant to the alleged violation of FCC Rule § 64 702(c)

(2) If the BOC has not maintained records or other data for the Bureau to resolve fully the alleged violation of FCC Rule § 64 702(c) or if it otherwise fails to produce such data in its Answer, then there shall be a rebuttable presumption in the case that the Complainant has established the alleged violation of FCC Rule § 64 702(c) Complainant may request by motion filed within 10 days after the BOC's Answer an order that such a rebuttable presumption exists in the case, the Bureau shall issue an order granting or denying such motion within 10 days after the time for filing of the BOC's opposition to the complainant's motion

(b) After the 15-day response period has elapsed under FCC Rule §64 702(c)(3), the ISP may file a complaint with the FCC concerning the BOC's compliance with its "new service" obligations

(c) Except if a complaint alleging a violation of FCC Rule § 64 702(c) is accepted for handling on the Accelerated Docket, the Commission shall issue a written order resolving any complaint alleging a violation of FCC Rule § 64 702(c) within 180 calendar days from when such complaint is accepted for filing

EXPLANATION

This rule is proposed to streamline regulation of the former Bell Operating Companies' ("BOCs") wireline broadband services under Title II of the Communications Act consistent with the public interest. The proposed rule presents a significant streamlining of the various and sometimes overlapping Title II *Computer Inquiry* obligations for broadband (advanced and/or high-speed) services that currently apply to the BOCs, including all affiliated BOC providers of telecommunications. The proposal supplants the current *Computer Inquiry* obligations for BOC wireline broadband services, set forth in myriad FCC orders and precedent, with a set of Title II rules that are deregulatory, simple, flexible and enforceable and that establish clear access for information service providers ("ISPs") to BOC advanced services and networks to enable ISPs to provide a diversity of competitive information services to the public. Further, to assure enforcement of these streamlined access obligations, the proposal includes new procedures, in a new FCC Rule Section 1.737, described below, for handling ISP formal complaints against BOCs. Under the proposed streamlined Title II rules, ISP access to the wireline broadband transmission components of the BOC networks would provide the essential framework for a vibrant information services market that will, in turn, lead to a number of proven consumer benefits, including robust price and service competition among BOC-affiliated and unaffiliated ISPs, creating innovation, diversity and demand for broadband services.

Under this approach, the Commission could eliminate for wireline broadband services current FCC rule sections 64 702(c) and (d) and the particular requirements set forth in the *Computer Inquiry* precedent and adopt instead a simplified FCC rule section 64 702 (c)(1)-(4), setting forth BOC Title II obligations in a simple, comprehensible and streamlined manner More specifically, the proposed rules would eliminate for wireline broadband services a variety of specific *Computer III* and *Computer II* obligations, stated in various FCC orders, including certain Comparably Efficient Interconnection ("CEI") obligations, such as the nine CEI parameters, Open Network Architecture ("ONA") unbundling obligations, CEI procedural obligations, such as CEI plan maintenance, reporting, and web-posting; ONA plan maintenance and prior FCC approval for ONA plan changes, reporting/filing obligations such as the Annual ONA Report, Semi-Annual ONA Report Quarterly Nondiscrimination Report, and Annual Officer Affidavit, obligations to tariff the *Computer III* basic service elements ("BSEs") and basic service access arrangements ("BSAs"), and the current rule section 64.702(c) regarding a *Computer II* separate subsidiary

I. NEW SECTION 64.702 (C)

Proposed Title II ISP Access Rule: New Section 64.702(c) (1)

§ 64 702(c) Each Bell Operating Company (including any affiliate)(hereinafter "BOC") shall provide access to its high-speed network to enhanced and information service providers ("ISPs") in the following manner

(1) Access to Transmission Services and Capabilities Each BOC shall offer to all ISPs, whether affiliated or unaffiliated, all of its high-speed network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions Such offerings shall be separate from any other BOC services, including enhanced or information services

Explanation of § 64.702(c)(1):

The proposed Title II rule is intended to take a broad and "bright-line" approach for all ISPs to have access to the same functionalities of the BOC wireline broadband networks.

including installation and maintenance of such functionality, whether used by unaffiliated or affiliated ISPs The relevant definitions in new § 64 702(c)(4) make clear that associated functions for ordering, repairing and/or signaling continue to be a key component for competition among ISPs and for rapid deployment to the public, and thus the proposed rule ensures openness of the BOC network, as well as associated functions, systems and databases

Building on the core Title II obligations of Sections 201(b) and 202(a) of the Communications Act barring discriminatory and unreasonable practices, this rule would ensure that the BOCs provide ISPs with access that is not only reasonable, but that is also equal and nondiscriminatory with the treatment and access the BOC provides to its own ISP operations and to other ISPs for broadband services Thus, for example, if a BOC-affiliated or preferred ISP has access to electronic OSS, databases, or other systems, then the BOC must ensure that competing ISPs have substantially equivalent access Further, consistent with nondiscrimination, if BOCs collocate information service equipment of affiliated or preferred ISPs, the BOCs would impute reasonable transport costs in a manner similar to minimization of transport precedent. In general, the FCC's Title II precedent, including information services precedent, would inform the Commission's interpretation and enforcement of the new rule In this way, all ISPs will have maximum opportunity to compete and maximum incentive to create high quality, low price and valuable services for consumers

As the BOCs introduce new broadband services, they must also reasonably offer access to competing ISPs and continue to offer services relied upon by ISPs and their customers. ISPs, for example, have deployed substantial high-speed information services to the public relying upon a dedicated and reliable connection for the customer, and it would be unreasonable, and a rule violation, for the BOC to discontinue or degrade such services

Proposed Transparency Requirement: New Section 64.702 (c) (2)

(2) Transparency

(A) With respect to the rates, terms and conditions of the network transmission services and capabilities used by or made available to any ISP, each BOC shall

(i) File an interstate tariff with the Commission describing such rates, terms, and conditions, or

(ii) Post on its publicly available Internet website, in an accessible and easy to understand format, current and specific information describing such rates, terms and conditions

(B) If a BOC enters into an individual contract with an ISP for high-speed network transmission services and capabilities, then the BOC shall tariff or post on its publicly available Internet website, in an accessible and easy to understand format, the following information.

(i) the term (including renewal option) of the contract;

(ii) a description of the high-speed network transmission services and capabilities provided under contract;

(iii) minimum volume commitments and price for each of the high-speed network transmission services and capabilities, as well as volume discounts, and

(iv) all other classifications, terms or practices affecting the contract rate

(C) Each BOC shall provide advance written notice to all purchasing ISPs, including notice by email, of any changes to the rates, terms, and conditions of any of the BOC's high-speed network transmission services and capabilities In the event the BOC seeks to discontinue any service or capability used by an ISP, such written notice shall be not less than 120 days prior to the proposed discontinuance.

Explanation of § 64.702(c)(2):

This subsection of the proposed rule would streamline for wireline broadband services the *Computer II* and *Computer III* requirements that BOCs tariff (with the Commission and/or state regulatory agencies) the elements of the broadband services and instead proposes an alternative approach to transparency At the same time, BOCs would still be required to provide service to ISPs including affiliated ISPs, on rates, terms and conditions that are transparent and publicly available for all ISP customers and competitors This rule does not restrict the BOC's ability to

establish broadband rates or terms that are novel or tailored to the needs of specific classes of ISP customers, such as low-volume or high-volume arrangements

Under the proposal, the BOC may choose whether to use existing FCC tariffing processes for BOC wireline broadband services or to web post rates, terms, and conditions, similar to the way that FCC rules require nondominant interexchange carriers to webpost their rates, terms and conditions *See* 47 C F R § 42 10 The rule also makes clear in subsection 64 702(c)(2)(B) that in the event the BOC enters into an individual case basis contract with any ISP for high-speed network transmission services and capabilities, it must continue to make public the basic parameters of such contract, consistent with requirements governing contract tariffs today. *See* 47 C F R § 61 55(c) The requirement of prior notice in subsection 64 702(c)(2) to existing ISP customers will ensure that ISPs are provided advance information should the BOC intend to make changes to the services upon which the ISPs and their customers rely In addition, given that ISPs have deployed significant high-speed information services to the public relying upon BOC services and capabilities, this rule would require 120 days notice for discontinuance, to allow the ISP to transition reasonably to a new service or to request continuation of the service pursuant to subsection 64 702(c)(3)

By its operation, the rule would require the BOC to meet all of its safeguard obligations; in the case of a rule violation, the Commission would have authority to order any equitable or compensatory relief, as it deems appropriate to remedy the matter

Proposed New Capabilities Requirement: New Section 64.702(c) (3)

(3) Access to New Transmission Services and Capabilities

(A) An ISP may request in writing that a BOC provide access to new network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions

(B) Where the ISP makes such a reasonable request, the BOC shall offer such access within 90 days, unless the Commission extends such time where the BOC, upon petition, demonstrates good cause

(C) The BOC shall have 15 days to respond in writing to the requesting ISP, and such response shall describe either

(i) how the BOC will offer the requested access within 90 days of the request, or

(ii) the specific basis for the BOC's position that the requested access is not technically feasible or economically reasonable.

Explanation of § 64.702(c)(3):

To promote full and robust wireline broadband information services competition, with its proven and clear consumer welfare benefits, the proposed rule ensures that as new services, capabilities and functionalities emerge, consistent with the evolution of technology and network design, ISPs have continuing access so that they can provide innovative broadband information services to their customers The rule would also enable ISPs to continue using services that the BOCs may seek to discontinue for their own ISPs by requesting such access as a "new" service Once the BOC provides a service pursuant to this subsection, that service would be offered pursuant to the terms of subsections 64 702(c)(1) and (2), requiring just, reasonable and nondiscriminatory rates, terms and conditions and transparency, to allow all ISPs to avail themselves of the offering

The proposed rule would eliminate for wireline broadband services the sometimes complex and cumbersome ONA process, which includes ONA plans, ONA plan amendments, the Annual and Semi-Annual ONA Report, and similar specific requirements that are related to these obligations The proposed rule would also eliminate for wireline broadband services ONA reporting and other ONA safeguards and, instead, require a simple process for service requests, with marketplace negotiations and enforceable ISP rights of access

The ability of unaffiliated ISPs to introduce new information services depends on their ability to obtain access arrangements that are otherwise not in use specifically by the BOC ISP While this was a central tenet of the ONA process, the proposed rule greatly simplifies for wireline broadband services the former process and regulatory framework. *Third Computer Inquiry* Report and Order, 104 F C C 2d 958, 1064-66 (1986). Thus, ONA plans, amendments, reporting and record keeping are not the focus of the new approach If an ISP makes a legitimate request for a new wireline broadband service or capability, however, then it is vitally important for the BOC to offer such access in an expeditious manner, since otherwise new broadband information services will not reach the market and, equally important, the BOC ISP could strategically limit or delay its use of services or capabilities to prevent competitive new broadband services from reaching consumers Under this rule, the BOC would be required to respond to ISP requests for new wireline broadband service transmission services and capabilities with reasonable rates and terms of service The right to request and, if necessary, follow up with an enforcement action would establish a minimum of regulation and an enforceable right for the introduction of creative new information services to the American public

Proposed Definitions: New Section 64.702(c) (4)

(4) Definitions For purposes of this subsection (c)

"Transmission services and capabilities" shall include, without limitation, the BOC's transmission or telecommunications components or lines, switching and routing components, ordering and operations support systems ("OSS"), signaling, and other network functions or features

"High-speed network" means a network offering transmission rates of more than 200 Kbps in at least one direction

Explanation of § 64.702(c)(4):

The definitions of the proposed rule are designed to encompass for wireline broadband offerings the type of functionalities, services and capabilities referenced throughout the

Computer Inquiry proceedings, including functionality necessary for ISPs to provide broadband-based services to consumers such as OSS and similar capabilities The definitions are premised on the principle that access is only viable if it can be used efficiently The definition of "high-speed network" tracks the definition previously adopted by the FCC. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities*, Third Report, 17 FCC Rcd. 2844, ¶ 7 (2002) (As it has done in prior reports on advanced services, FCC adopts "the term 'high-speed' to describe services with over 200 kpbs capability in at least one direction").

II. NEW SECTION 1.737 – ENFORCEMENT

Proposed New Rule For Enforcement of ISP Access Rule – § 1.737

§1 737 ISP Complaints Regarding Rule Section 64 702(c)

(a) Where a complaint alleges a violation of FCC Rule Section 64 702(c), the following additional procedures shall also apply

(1) In its Answer, the Defendant shall state clearly and precisely all information in its possession, including data compilations (including records of OSS configurations, order processes, data on specific orders or maintenance records, high-speed network transmission services and capabilities deployment, etc.), and produce and serve on Complainant and the FCC all such information, including copies of all contracts or arrangements for high-speed network transmission services and capabilities, that may be relevant to the alleged violation of FCC Rule § 64 702(c)

(2) If the BOC has not maintained records or other data for the Bureau to resolve fully the alleged violation of FCC Rule § 64.702(c) or if it otherwise fails to produce such data in its Answer, then there shall be a rebuttable presumption in the case that the Complainant has established the alleged violation of FCC Rule § 64 702(c). Complainant may request by motion filed within 10 days after the BOC's Answer an order that such a rebuttable presumption exists in the case, the Bureau shall issue an order granting or denying such motion within 10 days after the time for filing of the BOC's opposition to the complainant's motion

(b) After the 15-day response period has elapsed under FCC Rule §64 702(c)(3), the ISP may file a complaint with the FCC concerning the BOC's compliance with its "new service" obligations

(c) Except if a complaint alleging a violation of FCC Rule § 64.702(c) is accepted for handling on the Accelerated Docket, the Commission shall issue a written order resolving any complaint alleging a violation of FCC Rule § 64 702(c) within 180 calendar days from when such complaint is accepted for filing

Explanation of § 1.737:

The proposed rule would facilitate significant streamlining of the various Title II *Computer II* and *Computer III* obligations, as explained above, by providing ISPs with effective enforcement in complaint actions when significant BOC misconduct has occurred. As a Title II-based rule, Section 208 and existing FCC and judicial precedent would remain relevant to determine what is just, reasonable and/or nondiscriminatory under the Communications Act.

The proposed rule reflects the fact that due to ISP reliance upon the BOCs, the BOC controls much of the information relevant to a fair and accurate determination of whether a rule violation has occurred. It is the BOC that controls the OSS systems, maintenance records, configurations of systems, and access to the transmission components and capabilities, as well as the ability to modify those things for its benefit. Typically, the ISP does not have access to this information, especially in cases where discriminatory practices are alleged. To address this disparity, various *Computer Inquiry* obligations imposed several reporting and certification obligations to ensure nondiscrimination and transparency by the BOC. The proposed deregulatory approach, however, eliminates for wireline broadband services BOC reporting and similar obligations. Instead, to ensure the effective administration of justice, the protection of the public interest, and to avoid the potential for pre-litigation evidence destruction, the BOC is held responsible for producing all necessary information to resolve any complaints that may arise. If the BOC cannot do so or has chosen record maintenance or retention systems that are inadequate for the Commission to resolve the dispute, then the burden is placed properly on the BOC to demonstrate that no rule violation has occurred. This limited shift of burden is consistent with FCC and judicial precedent in cases where the defendant has failed to produce evidence within its exclusive access or control that is necessary for adjudication of the dispute. FCC rules and

precedent are wholly consistent with this approach *Cf* 47 C.F.R. § 64.1150(d) *See also, In the Matter of WorldCom, Inc* Order, DA 02-2569 (rel. Oct 8, 2002), *In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers,* Report and Order, 12 FCC Rcd 22497, ¶ 278 (1997), *In re Complaint of L Douglas Wilder and Marshall Coleman Against Station WRIC-TV Petersburg, Virginia,* Further Discovery Order, 12 FCC Rcd 4111, ¶27 (1997) Indeed, Part 42 of the Commission's rules requiring carriers to retain certain records, 47 C F R § 42 1 *et seq* , "was established to ensure the availability of carrier records needed by this Commission to meet its regulatory obligations." *In the Matter of Revision of Part 42*, Report and Order, 60 R R 2d (P&F) 1529, ¶ 2 (1986).

In addition, because experience has shown that enforcement delay can effectively become a denial of access in the rapidly moving broadband information services arena, the rule would require resolution of complaints within 180 days For the same reasons, it is assumed that the Enforcement Bureau would make more frequent use of the accelerated docket process to resolve cases of enforcement of the ISP access rule

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FILED ELECTRONICALLY

September 3, 2003

Ms Marlene H Dortch
Secretary
Federal Communications Commission
445 12 Street, SW
Washington, DC 20554

Re: CC Docket No. 02-33 -- Appropriate Framework for Broadband Access to the Internet over Wireline Facilities
Ex Parte Communication

Dear Ms Dortch

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, on behalf of The BroadNet Alliance (BroadNet), I am filing this letter to FCC Chairman Michael K. Powell electronically on behalf of the BroadNet Alliance and other signatories regarding the above mentioned rulemaking

If there are any questions regarding this submission, please contact me at the above number

Respectfully submitted,

Maura Corbett

Executive Director

September 3, 2003

The Honorable Michael K Powell
Chairman
Federal Communications Commission
The Portals
TW-A325
445 12th Street. S W.
Washington. D C 20554

Dear Chairman Powell·

The undersigned organizations, representing diverse interests that will be affected by the Commission's decision in the *Wireline Broadband* proceeding, write to express their united support for a few central principles with which we all agree. We urge the Commission to be guided by these principles in its *Wireline Broadband* decision.

1. Diversity Among Broadband ISPs Is in the Public Interest

Today there is vigorous competition and variety among Internet Service Providers ("ISPs") offering high-speed Internet access services over wireline broadband transmission facilities ISPs. whether independent or affiliated with Incumbent Local Exchange Carriers (ILECs), compete with one another for retail customers, distinguishing themselves on price, service quality. customer service, features like spam protection, content, privacy protection and other points. Such competition and diversity also provides market-based assurance to e-commerce companies, that ISPs will not hinder access to their websites Consumers may determine for themselves, for example, whether to pay more for an ISP with better customer service, pay less for a service with more pop-up ads. or what they want from among a huge variety of combinations of distinguishing features and characteristics that define the retail wireline broadband ISP market in a given region Enabling consumers to choose from among a large variety of wireline broadband ISPs provides a tremendous benefit to consumer welfare and promotes the next generation of investment and innovation in new applications and services.

2. Current Commission Treatment of Wholesale Wireline Broadband Transmission Services Has Been a Success

According to the Commission's most recent data, the number of high-speed asymmetrical digital subscriber line ("ADSL") arrangements in service increased by 64 percent in 2002. compared to 61 percent for cable modem service. Driving this growth in the use of wireline broadband transmission are innovative ISPs, e-commerce companies, and others providing consumers with a reason to want broadband service by providing content. applications. and other features capitalizing on the capabilities of broadband.

All of this progress has occurred under the Commission's current regulatory framework for wireline broadband transmission services. To the extent that ILECs argue that progress could be greater, they have failed to demonstrate any causative connection with current regulations. And even if they could, we would urge the Commission to consider with the help of interested parties ways of addressing any specific negative impact shown without dismantling the very framework that has made internet access a reality for millions of American consumers.

3. The Commission Should Continue to Require Non-Discriminatory Access to ILEC Wireline Broadband Transmission Services

In light of the significant public interest benefits of diversity among wireline broadband ISPs and the absence of any demonstrated harm to the public interest caused by current regulations, the Commission should preserve non-discriminatory access to ILEC wireline broadband transmission services. Permitting ILECs to discriminate in favor of affiliated or preferred ISPs would harm competition and consumer welfare by reducing ISP diversity.

Under current regulations, all ISPs are able to obtain wireline broadband transmission services from ILECs on non-discriminatory rates, terms, and conditions. Without this transmission, ISPs would be virtually unable to provide competitive high-speed Internet access service to the mass market. Non-discriminatory rates, terms and conditions for transmission service enable ISPs to distinguish their retail products as they see fit. Legalized discrimination in favor of ILEC-preferred ISPs would result in non-preferred ISPs facing an insurmountable competitive disadvantage and being driven from the marketplace until there is but one ISP remaining on an ILEC's wireline broadband platform in each ILEC service area. This result would disserve the public interest.

For these reasons, we urge the Commission to preserve ISP competition and consumer choice in wireline broadband services by maintaining rules designed to ensure that ILECs provide nondiscriminatory access to wireline broadband transmission services under Title II of the Communications Act.

Sincerely,

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