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May 28, 2004

VIA ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
Room TW-A325
445 12th St., S.W.
Washington, D.C. 20554

Re: In The Matter of IP Enabled Services
WC Docket No. 04-36

Dear Ms. Dortch:

Please find attached the comments of EarthLink, Inc. to be filed in the above-referenced proceeding.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,

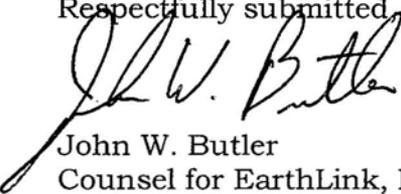

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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
IP-Enabled Services)	WC Docket No. 04-36
)	

COMMENTS OF EARTHLINK, INC.

EarthLink, Inc. (“EarthLink”), a major Internet service provider (“ISP”), files these comments in response to the Notice of Proposed Rulemaking released in the above-referenced docket on March 10, 2004 (the “NPRM”). As an ISP, all of EarthLink’s services are transmitted across the underlying networks that it employs through the use of the TCP/IP suite of protocols. As such, the proper classification and regulation of what the Commission calls “IP-Enabled Services” is critical to EarthLink’s business.

EXECUTIVE SUMMARY

EarthLink commends the Commission for initiating this inquiry into the proper regulation of services that are transmitted using the Internet Protocol (“IP”). Many parties in numerous fora and Commission proceedings have made arguments that the use of IP is a determinative factor in how their services are regulated. Those arguments have already led to confusion, insupportable regulatory decisions, and arbitrage business models that are unsustainable and therefore detrimental to service innovation and

competition. Clarity with respect to these assertions will benefit regulators, industry participants, and consumers alike.

As important as it is for the Commission to provide clarity with respect to IP-based services, EarthLink respectfully notes that the fundamental premise of the NPRM—that the use of IP in providing a service in some manner determines the proper classification or regulation of that service under the Communications Act—is demonstrably and dangerously incorrect. IP by itself is neither a network nor a service; it is merely one of literally dozens of transmission protocols that may be employed to facilitate the transmission of information. The fact that IP has become virtually ubiquitous for the transmission of many types of services certainly makes it appropriate for study by the Commission, but that ubiquity does nothing to change the fact that the use of IP in the provision of a telecommunications service or the delivery of an information service has absolutely no bearing on the proper regulatory treatment of such services.

A related problem with the NPRM is that it treats as essentially identical three elements that are in fact quite different and distinct: (1) the Internet Protocol itself, (2) networks that support IP-based transmissions, and (3) the services that are delivered over those networks. Having conflated the transmission protocol with the underlying networks and the services that ride over networks using that protocol, the NPRM then suggests that, since IP transmissions move through the network differently than circuit switched transmissions, there are two distinct physical networks over which those two types of transmissions move. That, of course, is not correct. The use of IP does not

involve the creation of any new cable, wire, or wireless network; it simply involves using the same physical transmission facilities in a different way.

For two related reasons, this suggestion that IP networks are separate from other networks is perhaps the most dangerous misapprehension in the NPRM. First, an assumption that there is a separate “IP network” assumes into existence a theoretical source of competition for existing transmission media that in reality does not exist. Second, the suggestion that there exists a separate “IP network” (or many IP networks) obscures the fact that all providers of IP services that do not own their own transmission facilities are entirely dependent on access to common carrier transmission networks in order to be able to provide services to their consumers. If networks that employ IP are deemed to provide only “information services” (a possibility apparently entertained by the NPRM), then non-facilities-based providers of IP-based services will have no statutory right to obtain transmission over those networks. This is the case because the fundamental right to obtain transmission service upon demand on reasonable and non-discriminatory terms under sections 201 and 202 of the Communications Act applies only to common carrier transmission services.

If “IP-Enabled” transmission were found to be an information service, there would be nothing in the Act to prevent network operators from simply prohibiting non-facilities-based service providers from using their networks. Under that scenario, facilities-based carriers, which in the case of DSL and cable modem service providers today already largely operate under either monopoly or duopoly conditions with respect to broadband transmission services, would be assured of extending those market-dominant positions into the information services markets. Thus, if the Commission were

to adopt a rule under which the conversion of a transmission network to operate primarily or solely using IP was by itself sufficient to render the transmission service so provided an information service, the Commission would by that action eliminate all of the innovation and competition that the services and service providers described in the NPRM have the promise of providing.

EarthLink agrees with the Commission that there are many new and innovative services that are today or soon will be offered using IP as part of the transmission path. EarthLink also agrees that many of those services, whether they may be held to be telecommunications, telecommunications services, or information services, should not be subject to unnecessary regulation. That said, however, it is imperative both that the Commission make service classification decisions based on the standards set forth in the Act and also that the Commission make regulatory decisions under its forbearance authority with the full realization that any action that eliminates basic common carriage requirements with respect to networks and services that employ IP would destroy the very competition and innovation that the Commission seeks to encourage. The Commission relegates this question of the common carrier nature of IP-enabled networks—the single most important question in the entire proceeding and the question from which the answers to all of the other questions flow—to two brief paragraphs.¹ EarthLink respectfully submits that no legitimate rule may be issued on the subject matter covered by the NPRM until the common carriage issue is elevated from afterthought to organizing principle. More generally from a procedural standpoint, the current NPRM cannot result in the adoption of any rule, because the NPRM fails to propose any rule.

¹ See NPRM at ¶¶ 24 and 73.

Any action in this docket would require the issuance of a revised notice of proposed rulemaking that goes beyond asking questions and actually proposes concrete regulatory action.

COMMENTS

1. Introduction.

The Commission, of course, is a creature of statute, authorized to exercise only those powers assigned to it by Congress through the Communications Act, 47 U.S.C. §§ 151 *et seq.* (the “Act”), and other statutes. The Act, in turn, takes a functional approach to regulation. Unconcerned with what type of physical medium a service provider uses, the Act’s various provisions apply or do not apply, as the case may be, depending on the function that a particular service provides. Thus, for example, transmission of information selected by the user between points chosen by that user, without any change to the form or content of that information, is “telecommunications”² so long as the transmission falls into the broad scope of “communication by wire or radio.”³ Likewise, such telecommunications is a “telecommunications service” if it is offered to the public for a fee, “regardless of the facilities used.”⁴ Other services, if delivered “via telecommunications” are deemed to be “information services” if they offer “a capability

² See 47 U.S.C. § 153(43), which 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.”

³ 47 U.S.C. § 152.

⁴ See 47 U.S.C. § 153(46): “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.”

for generating, acquiring, storing, retrieving, utilizing, or making available information. .

. .⁵

Because each of the relevant definitions is functional—not tied to a particular technology or medium—the Act is exceedingly flexible and resilient in dealing with new services and new technologies. At the same time that the Act’s function-based structure is able to accommodate technological change without the need for frequent statutory amendments, that same structure requires some precision and rigor in the examination of the functions performed by any particular service. Given this, a necessary beginning to any analysis of “IP-enabled services” is an examination of what function IP serves.

EarthLink provides that analysis in the section immediately below. In section 3, EarthLink explains how the functionality of the Internet Protocol meshes with the Act’s definitions and regulatory structure. In section 4, we address the most obvious policy implications of the issues under consideration by the Commission. Finally, in section 5 we discuss the fact that the NPRM in its current form is too vague and inconclusive to support the issuance of a legally sustainable final rule.

2. The Internet Protocol’s Sole Function Is To Facilitate the Transmission of Information.

Appropriately, the Commission opens the NPRM by describing what it means by “IP-enabled services”:

Specifically, the scope of this proceeding – and the term “IP-enabled services,” as it is used here – includes services and applications relying on the Internet Protocol

⁵ See 47 U.S.C. § 153(20): “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.”

family. IP-enabled “services” could include the digital communications capabilities of increasingly higher speeds, which use a number of transmission network technologies, and which generally have in common the use of the Internet Protocol. Some of these may be highly managed to support specific communications functions. IP-enabled “applications” could include capabilities based in higher-level software that can be invoked by the customer or on the customer’s behalf to provide functions that make use of communications services. Because both of these uses of IP are contributing to important transformations in the communications environment, this Notice seeks commentary on both, and uses the term “IP-enabled services” to refer to “applications” as well as “services.” Recognizing the broad scope entailed by this definition, we invite comment below on how we might more rigorously distinguish those specific classes of IP-enabled services, if any, on which we should focus our attention. We emphasize, however, that this Notice does not address standard-setting issues for the Internet Protocol language itself, which are more appropriately addressed in other fora, or other items outside this Commission’s jurisdiction, such as Internet governance.⁶

The NPRM goes on to describe any number of services that are now provided or that one day might be provided using IP-based transmission. What is missing from the NPRM, however, is any discussion of what the Internet Protocol is and what function it serves. The organizing premise of the NPRM is that the use of IP is somehow relevant to the proper classification and regulation of services that employ transmission that uses that particular protocol. As is discussed above, however, the Act’s application to any given service depends on what that service does. Accordingly, before one can apply the Act to IP, one must know what IP is.

The question of what IP is has a very simple answer. As its name suggests, the Internet Protocol is simply a set of rules for transmitting data across a series of interconnected networks. IP, and its companion Transmission Control Protocol (“TCP”), have been described this way by the Commission’s Office of Plans and Policy:

Internet Protocols. “TCP,” or “Transmission Control Protocol,” converts messages into streams of packets at the source, then reassembles them back into messages at the destination. “IP,” or “Internet Protocol,” handles the addressing,

⁶ NPRM at ¶1 n.1.

seeing to it that packets are routed across multiple nodes and even across multiple networks with multiple standards, including Ethernet, “FDDI” and X.25 protocol. The TCP/IP enables communications between distant public and private networks running over any medium: analog or digital phone lines, traditional network lines, fiber, cable television facilities and wireless systems. It is also “computer independent,” running across personal computers (PCs), Macintoshes, workstations and mainframes.⁷

As this description makes clear, IP is simply a set of rules that allow for the transmission of packetized data across a network or across multiple networks. IP does not interact with the information that it transmits. Indeed, the entire concept of packet switching is that the content or “payload” of the packet is “wrapped” in a “header” that carries the addressing information necessary to route the packet from its origin to its intended destination. IP does not create or modify the information being sent, but merely serves to address and route that information. Only after delivery (which is confirmed by TCP, not IP) to the receiving device is there any potential manipulation of the contents of the message.

As the description above suggests, IP is attractive in large part because it allows packets to travel over multiple transmission media using multiple lower layer transmission configurations. IP does not care whether the packets that it delivers travel over cable, DSL, dial-up, wireless, or any other medium, or if a network operates using ATM, X.25, ISDN, or some other transmission configuration. This means that any network can be an “IP network,” a term that is often used but never explained in the NPRM. This is a crucial point, because the NPRM seems to assume that there is a multitude of “IP networks” that will allow for a substantial increase in competitive

⁷ Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper 30 at 8 (August 1988) (footnote omitted) (underline in original).

platforms.⁸ To the extent that this is in fact the Commission’s belief, the Commission is fundamentally mistaken. IP is not magic, and its use does not create new physical networks where none exist. In the interest of proceeding from a common base of assumptions, EarthLink respectfully requests that the Commission promptly confirm that it is not the Commission’s understanding that “IP networks” are somehow separate from the physical facilities over which IP transmissions ride.

3. Application of the Communications Act to “IP-Enabled Services.”

At the end of footnote 1 of the NPRM, the Commission “invite[s] comment below on how we might more rigorously distinguish those specific classes of IP-enabled services, if any, on which we should focus our attention.”⁹ The invitation is appropriate, because, as the Commission points out, the scope of the proceeding is broad enough to cover both transmission services (“digital communications capabilities of increasingly higher speeds”) and applications that “include capabilities based on higher-level software that can be invoked by the customer or on the customer’s behalf to provide functions that make use of communications services.”¹⁰

The distinction that the Commission suggests between transmission services and applications that ride on top of those transmission services is, of course, reflected in the Act. The operative statutory distinction is between “telecommunications” and “telecommunications services” on the one hand, and “information services” on the other hand. As is discussed in section 1 of these comments, these are functional definitions

⁸ See, e.g., NPRM at ¶¶ 22 and 36.

⁹ NPRM at ¶1 n.1.

¹⁰ *Id.*

that look at what a given service or process does, not how or over what network it is provided. Application of these definitions to IP and the various types of “IP-enabled service” as broadly defined by the NPRM results in relatively simple classification decisions with respect to the vast majority of services.

a. The Use of IP Is Irrelevant to Classification Determinations Under the Act.

As noted above, the organizing premise of the NPRM is that the use of IP is the distinguishing feature of the services about which the Commission seeks comment. As discussed in section 2, above, however, it is clear that IP is nothing more or less than a set of rules that control, at a very basic level, how information is transmitted across networks. As such, IP itself is merely one element of the network architecture. It is not by itself either “telecommunications,” “telecommunications service,” or “information service,” because it does not exhibit any of the functionalities by which the Act defines those terms. Most important, because the statute makes no regulatory distinctions based on the internal workings of the networks over which services are offered,¹¹ the mere presence or absence of IP in a network or service does not, either alone or in combination with other factors, determine the regulatory classification of that network or service. This

¹¹ The definition of “telecommunications service,” for example, defines that term with regards to the public offering of telecommunications “regardless of the facilities used.” 47 U.S.C. § 153(46). The definition of “information service” reinforces the technological neutrality of the statute by excluding from the scope of “information service” “any use of any such [information manipulation] capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20) (brackets added). Put simply, the internal operations of networks are not the concern of the Commission unless those operations impact a regulated function such as the offering of telecommunications service (for example, notices of network changes that are required to be published under 47 C.F.R. § 325). The Commission acknowledges this distinction in footnote 1 of the NPRM, where it states that “this Notice does *not* address standard-setting issues for the Internet Protocol language itself, which are more appropriately addressed in other fora, or other items outside this Commission’s jurisdiction, such as Internet governance.” NPRM at ¶1 n.1 (emphasis in original).

conclusion is consistent both with the language of the Act and also with the Commission's own recent and explicit holding that the Act is technologically neutral:

In the Order, we first conclude that the pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services. Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets.¹²

Thus, although the Commission has found it convenient to define the scope of the NPRM in terms of the use of IP in the services under consideration, such employment of IP does not under the Act have any bearing on the proper regulatory classification of the services so described.

b. The Statutory Classification Analysis Must Be Based On the Language of the Act.

The NPRM seeks comment regarding the proper statutory classification of IP-enabled services. Recognizing the breadth of that category of services, the Commission also asks whether some IP-enabled services should be treated differently than others. The only service that the NPRM discusses in any detail is voice service provided using IP ("VoIP"). The NPRM's discussion of that service, however, is primarily technical and factual; the NPRM does not say which statutory classification the Commission believes VoIP falls within, or why, although it asks for public comment on that issue.

Because the NPRM does not attempt to apply the definitions of the Act to the services under consideration, it is impossible to know what approach the Commission intends to take. Equally frustrating is the fact that, although the Commission acknowledges that the relevant definitions are those of "telecommunications," "telecommunications service," and "information service," the Commission offers no

¹² *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking at ¶11 (Rel. Aug.7, 1998).

analysis as to why a particular service might fall under one rather than the other. Under these circumstances, it is extremely difficult to comment, because the Commission has not given any hint of what it thinks the law is.¹³ That said, EarthLink offers below some basic observations that it hopes will be helpful to the Commission.

i. VoIP.

The only “IP-enabled service” that the NPRM discusses in any detail is VoIP, so EarthLink turns first to that service. As the general discussion above regarding the structure of the Act and the functional logic of its definitions demonstrate, the primary question that must be asked when classifying a service is “What does the service do?” Once that question is answered, applying the Act’s definitions is a straightforward exercise.

The primary service provided by VoIP is the ability for a user to call anyone the user chooses and carry on a conversation.¹⁴ The information transmitted by the VoIP service is only information of the user’s choosing, and the transmission occurs between or among points specified by the user. In all cases the user’s information starts and ends as voice speech in whatever language the user chooses to speak. To the extent that VoIP service does not generate, acquire, store, transform, process, retrieve, utilize, or make generally available the user’s speech, it is not an information service. To the extent that

¹³ The lack of meaningful notice in the NPRM is discussed further in section 5 of these comments. We also note that the Commission’s apparent lack of any current opinion as to the state of the law would appear to preclude the issuance of any declaratory orders in those related cases referenced by the NPRM at ¶ 32 n.110.

¹⁴ VoIP may include many separate features, some of which, like voice mail, are clearly information services, while others, like call forwarding and conference calling, are considered part of a telecommunications service.

VoIP service merely transmits the user's speech¹⁵ to the point of the user's choosing, it is telecommunications, and, if offered to the public for a fee, a telecommunications service.

Whatever arguments might be advanced that some component of VoIP might constitute an information service, it is clear that the presence of TCP/IP alone does not fit that definition. TCP/IP is a suite of protocols specifically designed to transmit information *without* changing the form or content of the information. If TCP/IP did change the form or content of the information it transports, then it could not have made possible the ubiquitous communication that is the hallmark of the Internet. Web pages would arrive looking different, word processing documents would lose their formatting, videos would not display properly, and voice would sound different. To the extent these problems occur today, it is not because TCP/IP failed in its transport mission, rather, it is because the software on the receiving computer is incompatible with the information sent to it.

EarthLink anticipates that arguments will be made that "protocol conversion" associated with certain VoIP calls somehow converts VoIP into an information service. Because the Commission has not outlined its thoughts on the matter, and because EarthLink has not as of the date of this filing read the comments of other parties, we limit the discussion of that issue here. However, EarthLink does note that VoIP calls between TCP/IP enabled devices (for example between two personal computers or customer premises equipment supplied by the VoIP provider) undergo no net change in protocol, and the information being sent is not processed or transformed in any way. It is sent and

¹⁵ Because it is an application that, although in existence for many years, has only recently seen broad commercial employment, voice communication using IP has attracted much attention. The Act, however, makes no distinction between voice, data, or any other payload carried by a packet-switched service, and neither should the Commission. Thus, "voice over IP" is no different than "data over IP" or "video over IP." As is noted above, the presence of IP is statutorily irrelevant.

received in TCP/IP. The transmission of voice or any other information between two devices running TCP/IP is sent “without change in the form or content,” and thus the transmission appears to meet the definition of “telecommunications.”

With respect to VoIP transmissions between TCP/IP enabled devices and non-TCP/IP enabled digital or analog telephones, there obviously must be a protocol conversion to enable a conversation to occur. However, the protocol conversion occurs for the sole purpose of facilitating the transparent transmission of the user’s information. To the extent that someone might argue that this type of protocol conversion is “processing” or “transforming” information within the meaning of those terms in the statutory definition of “information service,” such protocol conversion nevertheless falls squarely within that definition’s exception for functions used for the operation of a telecommunications network or the provision of a telecommunications service, at least insofar as the service with respect to which the protocol conversion takes place consists of transmission of information of the user’s choosing.¹⁶ The Commission itself in 1996 adopted this interpretation of the “information service” definition exception:

¹⁶ See 47 U.S.C. § 153(20) (“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.*”). *Id.* (emphasis added). The Commission’s Memorandum Opinion and Order in *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45 (Rel. Feb. 19, 2004) (hereinafter the “*Pulver Order*”), does not support a different outcome with respect to the application of the “information service” exception. Setting aside the fact that the Commission’s conclusion that pulver.com’s Free World Dialup service is an information service was dictum, the *Pulver Order* analysis regarding the information service exception on its face was based on the underlying holding that the service at issue included neither “telecommunications” nor “telecommunications service.” The first of those conclusions is clearly incorrect, because by definition there cannot be an information service unless there is also telecommunications. Just as clearly, the second conclusion is correct because the service is not offered “for a fee. . . .” In contrast, the vast majority of VoIP providers hold themselves out to the public to transmit communications from one place to the other. To the extent that such providers perform functions that might fit the language of the first clause of the definition of “information service,” “any use of any such

We note that, under Computer II and Computer III, we have treated three categories of protocol processing services as basic service, rather than enhanced services. These categories include protocol processing: 1) involving communications between an end user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; 2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and 3) involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end user). We agree with PacTel that analogous treatment should be extended to these categories of protocol processing services under the statutory regime. Because the listed protocol processing services are information service capabilities used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service," they are excepted from the statutory definition of information service. These excepted protocol conversion services constitute telecommunications services, rather than information services, under the 1996 Act.¹⁷

Finally, and most fundamentally, even in the event that a net protocol conversion inherent in transmitting information between users were deemed to be an "information service," that would be only the beginning of the analysis, not the end. Information services are by definition provided "via telecommunications."¹⁸ If that associated "telecommunications" is "offered for a fee directly to the public," then that telecommunications is also a "telecommunications service."¹⁹ As *Brand X Internet Services Inc. v. FCC*²⁰ demonstrates, the fact that an information service and its related

functions for the management, operation, or control of a telecommunications system or the management of a telecommunications service" is *not* an information service. 47 U.S.C. § 153(20) (emphasis added).

¹⁷ *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21,905, 21,957 (¶ 106) (Rel. Dec. 24, 1996), *as amended* by the Order on Reconsideration, 12 FCC Rcd. 2297, 2298-99 (¶ 2) (Rel. Feb 19, 1997).

¹⁸ See 47 U.S.C. § 153(20).

¹⁹ See 47 U.S.C. § 153(46).

²⁰ 345 F.3d 1120 (9th Cir. 2003) (mandate stayed pending possible petitions for *certiorari*). That bundling a telecommunications service with an information service does not change the nature of the telecommunications service is also consistent with over twenty years of Commission precedent, the *Cable Modem Declaratory Order*, which was vacated by *Brand X*, being the exception. See, e.g., *In the Matter of*

telecommunications service are marketed together instead of separately does nothing to change the regulatory classification of either component of the offering. That is, if there is in fact an information service component in the “IP-enabled services” under consideration in the NPRM, that component remains unregulated; by the same token, the telecommunications service component is treated by the Act as a common carrier service unless there is a valid exercise of the section 10²¹ forbearance authority to the contrary.

ii. *Pending Court Cases.*

The Commission has asked what effect pending court cases have on regulatory classification issues related to IP-enabled services. In particular, the Commission asks²² about the effect of *Brand X Internet Services v. FCC*²³ and *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*.²⁴ The *Vonage* case has no impact whatsoever. It is a district court case that is under appeal. As such it has no precedential value.

Brand X, on the other hand, unless it is reviewed and reversed by the United States Supreme Court, binds the Commission nationally on the issues there decided. Specifically, that case recognizes that each information service that is offered to the public for a fee by definition includes a telecommunications service component. That means that where information services are offered to the public for a fee, the transmission

Filing and Review of Open Architecture Plans, Memorandum and Order, 4 FCC Rcd. 1, 141 (1988); *In the Matter of Independent Data Communications Mfrs. Ass’n Petition for Declaratory Ruling that AT&T’s Interspan Relay Service is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd. 13717, 13723 (1995).

²¹ 47 U.S.C. § 160.

²² NPRM at ¶ 43.

²³ 345 F.3d 1120.

²⁴ 290 F. Supp. 2d 993 (D. Minn. 2003), *appeal pending*.

services used to provide those information services will be common carrier services that are available for the non-discriminatory use of all information service providers – precisely the situation that has prevailed (except for the Commission’s refusal to enforce the law with respect to cable-based common carriers) since the Commission issued its *Computer II* decision in 1980.²⁵ That decision, which the Commission has held was codified by the Telecommunications Act of 1996,²⁶ is responsible for the very innovation that has brought IP-enabled services to the point that they have reached today.

Commission acceptance of the *Brand X* decision would maintain and expand the procompetitive and anti-discriminatory framework that has allowed Internet-based services to flourish. We also note that the Commission’s acceptance of the *Brand X* result would substantially simplify the most contentious regulatory issues associated with IP-enabled services. This is because, as has been the case under the *Computer* inquiries, a baseline understanding that the transmission networks used to serve the public are open to all information service providers willing to pay a fair price means that there is a greatly reduced need to split hairs about the functionalities of each new service.

4. The Commission Must Expressly Deal With The Most Fundamental Impact of any Classification System – Whether IP-Enabled Networks and Transmission Services Will Be Classified as Common Carrier Telecommunications Services.

EarthLink’s final substantive comment is also its most important. Through fifty-six pages of technical discussion and questions about future regulatory policy with respect to “IP-enabled services,” the Commission nowhere engages in any discussion of

²⁵ *In the Matter of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C. 2d 384 (1980).

²⁶ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, 11511 (1998).

the fundamental question of whether IP-based transmission services offered to the public for a fee (either alone or in conjunction with other services) will be regulated as common carrier telecommunications services.²⁷ It is impossible to overstate the seriousness of this omission.

The entire structure of Title II of the Communications Act hinges on the concept of common carriage, and the Act's definitions sweep broadly to include service providers in that category. For nearly twenty-five years the information services industry has thrived on the basis on one simple concept—that networks built over public rights of way and transmission services offered ubiquitously to the public are available to all that are willing to pay reasonable and non-discriminatory rates to use them. It is the existence of this fundamental access to transmission that allows all of the innovators and entrepreneurs that the Commission purports to embrace to create and grow their businesses and to create the competition that the Commission and the public seek.

Very simply, unless network facility owners that hold themselves out to the public are required by law to sell transmission services to all comers, the only information services that will be available are those that the transmission providers themselves choose to offer. If common sense alone is insufficient to make this proposition self-evident, then the history to date of cable modem service in the United States provides an unambiguous demonstration of the real-world results of the Commission's failure to enforce the fundamental requirements found in sections 201 and 202 of the Act, 47 U.S.C. §§ 201 and 202.

The Commission is no stranger to this debate about the fundamental common carrier nature of networks used to serve the public over public rights of way. It is the

²⁷ The only *mention* of the subject occurs in passing in paragraphs 24 and 73 of the NPRM.

central issue in the cable modem service Declaratory Ruling that the Ninth Circuit invalidated in *Brand X*, and it is the central issue in the *Wireline Broadband Proceeding*.²⁸ EarthLink must reluctantly and respectfully—but unequivocally—point out that a failure by the Commission to engage in a transparent, detailed, and honest debate of the common carriage issue is a fundamental dereliction of the duties delegated to it by Congress. Accordingly, before the Commission takes any further action in this docket, EarthLink respectfully requests at a minimum that the Commission re-issue the NPRM to include a detailed discussion of whether or not the Commission believes that IP-enabled transmission services and networks are common carrier offerings that carriers must sell to the public on non-discriminatory terms, and why.

5. The NPRM Fails to Provide Adequate Notice of the Agency’s Intentions and Must Be Clarified Before It Can Serve as the Basis for Any Final Rule.

The NPRM is so procedurally deficient that any final rule emerging from it would face a serious legal challenge on procedural grounds alone.²⁹ The basis of the deficiency is the NPRM’s failure to comply with the “notice” element of the notice-and-comment requirements for rulemaking codified in the Administrative Procedures Act (“APA”), 5 U.S.C. §553(b). That section requires that:

b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

²⁸ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002).

²⁹ Courts will entertain procedural challenges even when a challenge to a substantive point is not allowed. *See, e.g., American Medical Assoc. v. Reno*, 57 F.3d 1129, 1134 (D.C. Cir. 1995).

...
(3) *either the terms or substance of the proposed rule or a description of the subjects and issues involved.*³⁰

The NPRM – although it asks numerous questions – does not provide any information concerning the terms or substance of any proposed rule. More succinctly, it does not in fact propose any rule at all. Although the NPRM might arguably provide a “description of the subjects and issues involved,” that description is not specific enough to be the basis for a rulemaking. The NPRM essentially requires commenters to frame the issues to be addressed; only then is any comment possible. This stands the APA process on its head; the government, not the public, is responsible for framing the issues.

Federal courts, including the United States Court of Appeals for the District of Columbia Circuit, have repeatedly held that section 553(b)(3) makes clear that it is the responsibility of the agency proposing the regulations to ensure that the “notice be clear and to the point.”³¹ The NPRM is neither clear nor to the point. To begin with, the NPRM frequently professes uncertainty as to whether any rulemaking is needed at all. *See, e.g.*, NPRM at ¶¶ 2 (“we seek comment . . . on whether any regulatory treatment would be appropriate for any class of services”); 6 (“appropriate regulatory treatment, if any”); 35 (“the extent – if any – that application of a particular regulatory requirement is needed”); 48 (“which particular regulatory requirements and entitlements, if any, should apply”). In *Home Box Office, Inc. v. FCC*,³² the court first stated the standard for sufficiency of notice: “The notice required by the APA, or information subsequently

³⁰ *Id.* (emphasis added).

³¹ *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988); *see also Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994).

³² 567 F.2d 9 (D.C. Cir. 1977).

provided to the public, must disclose in detail the thinking that has animated the form of the proposed rule and the data upon which that rule is based.”³³ Applying that standard, the court then noted “[a]t the outset, we must consider whether the Commission has made out a case for undertaking rulemaking at all. . . .”³⁴

In the current situation, it is clear that the Commission has not made a case for undertaking rulemaking at this time. Instead, the Commission appears still to be formulating its thinking toward IP-enabled services and is asking the public for assistance in making the determination as to what, if anything, needs to be done. A related problem stems from the NPRM’s recognition, in several places, that different regulations may be appropriate for different situations. *See, e.g.*, NPRM at ¶ 35 (“ensure that any regulations applied to such services are limited to those cases where they are appropriate”). Separate regulations might in fact be appropriate, and even required by law; but without any indication of when and to whom or what each category of regulation would apply, the current NPRM does nothing to suggest where the Commission might draw these lines. The current proceeding should therefore be considered a preliminary one that must be followed by the publication of a more specific proposal (preferably, an actual proposed rule or series of rules) on which interested parties can provide focused comments.

The ability of parties to make such informed and crucial comments is vital. In *American Medical Association v. Reno*,³⁵ the court wrote that the APA requirements, “which serve important purposes of agency accountability and reasoned decisionmaking,

³³ *Id.* at 35.

³⁴ *Id.* at 36.

³⁵ 57 F.3d 1129 (D.C. Cir. 1995).

impose a significant duty on the agency.”³⁶ In that case, the court ruled that the Drug Enforcement Agency had failed in its duty to provide sufficient details about the program it was proposing. Likewise, in *National Tour Brokers Association v. United States*, 591 F.2d 896 (D.C. Cir. 1978), a case in which the Interstate Commerce Commission attempted to argue that a vague and open-ended “Notice of Proceeding” was sufficient to be a notice of proposed rulemaking, the court noted that:

[T]he Commission argues that certain references in the notice were an adequate “description of the subjects and issues involved.” Our response is that, while this May [sic] have been an adequate description of the subjects and issues involved for purposes of suggestions for legislative change, it was not adequate for purposes of subsequently promulgated administrative rules. “Description(s) of subjects and issues” are of very little use to interested parties unless such parties are accurately apprised of the Purpose [sic] of the proceeding in which those subjects and issues are being aired. The attitude one takes toward issues may vary considerably depending on the context in which those issues are placed.³⁷

The mere inclusion of an issue in a lengthy NPRM does not mean that sufficient notice has been provided. In *McLouth Steel Products Corp. v. Thomas*,³⁸ the court rejected an EPA notice of proposed rulemaking in which a new method for evaluating hazardous waste was not mentioned in the summary and was given the “malleable and vague” subheading “approach” in the proposed rule. The court concluded that the NPRM did not sufficiently alert readers to the critical issue, and held that “[a]n agency may not introduce a proposed rule in this crabwise fashion.”³⁹ The EPA’s inadequate NPRM

³⁶ *Id.* at 1132.

³⁷ *Id.* at 900.

³⁸ 838 F.2d 1317 (D.C. Cir. 1988).

³⁹ *Id.* at 1322-23.

was much more specific than the Commission's in that the EPA at least provided both a summary and a proposed rule. It is as yet unclear what the Commission believes the "critical issues" will be in this rulemaking. The NPRM specifically declines to make any such identification, instead making statements such as "we do not presuppose that any one ground must be considered to the exclusion of any other ground, and invite commenters to explain why we should categorize services using a combination of factors, which may or may not include any of those listed below."⁴⁰ While it is admirable that the Commission appears willing to approach the subject of IP-enabled services with an open mind, such an open mind is no substitute for concrete proposals of how the Commission, even temporarily, envisions implementing such regulations, along with the statutory basis for those proposals.

In summary, the NPRM fails to meet the requirements of §553(b)(3) of the Administrative Procedures Act for many reasons, the most critical of which is that the NPRM provides the reader with absolutely no idea of what, if anything, the FCC is proposing to do in terms of regulating or de-regulating IP-enabled services. The NPRM asks a lot of questions, the answers to which can and should be used to develop a proposed rule. Before a final rule can be issued, however, it is necessary that the Commission cure the defects of the of the current NPRM by issuing a second NPRM, one which will use the information obtained through this round of comments to propose a rule or series of rules that are lucid and succinct and that inform commenters of the actual proposals being made so that appropriate comments may be made in context.

⁴⁰ NPRM at ¶ 37.

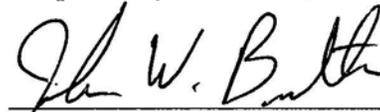
CONCLUSION

The Commission's NPRM is a timely and necessary attempt to deal with what is becoming an increasingly confused regulatory arena. That said, the NPRM suffers from four serious flaws. First, it assumes that the existence or absence of IP with respect to any given service is relevant to the regulatory classification or treatment of that service. That assumption is simply unsupported by the Act. Second, the NPRM appears to suggest that "IP networks" are physically separate from existing physical networks. This is factually inaccurate (and impossible) and suggests that transmission service competition exists where in fact it does not. Third, and most important, the NPRM studiously avoids any discussion of whether ubiquitously offered transmission services that employ IP will continue to be treated as common carrier services. Because the future of all of the entrepreneurial and innovative service offerings that the NPRM hails as revolutionary depends on the availability of common carrier transmission, this omission is nothing short of stunning in its scope. Finally, because the NPRM in fact proposes no rules, and gives no meaningful hint of what rules the Commission might propose, it fails to provide the notice required by the Administrative Procedures Act.

For all of the reasons stated herein, to continue on the current course would be a waste of Commission, industry, and judicial resources, and would result at best in an end product that must be done over again from scratch. Accordingly, EarthLink respectfully requests that the Commission take no action in this proceeding until such time as the Commission is able to issue a notice of proposed rulemaking that properly identifies and analyzes the critical issues that are only hinted at by the current NPRM.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Butler", written over a horizontal line.

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