

WRITER'S DIRECT DIAL
(202) 463-2510

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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

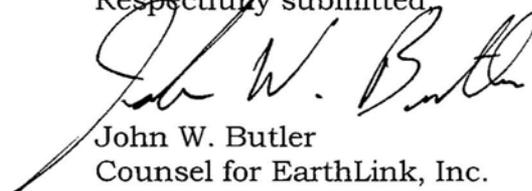
Re: IP-Enabled Services – WC Docket No. 04-36 and
Petition of SBC Communications Inc. For Forbearance from the
Application of Title II Common Carrier Regulation to IP Platform
Services – WC Docket No. 04-29

Dear Ms. Dortch:

Please find attached consolidated reply comments of EarthLink, Inc. to be filed in the two (2) above-referenced proceedings.

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

Respectfully submitted,


John W. Butler
Counsel for EarthLink, Inc.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
IP-Enabled Services)	WC Docket No. 04-36
)	
Petition of SBC Communications Inc. For Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services)	WC Docket No. 04-29

REPLY COMMENTS OF EARTHLINK, INC.

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

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

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REPLY COMMENTS OF EARTHLINK, INC.

EarthLink, Inc. (“EarthLink”) submits these combined reply comments for WC Dockets 04-29 and 04-36 due to the substantial overlap in the issues presented in these two dockets. As EarthLink and others pointed out in the initial comments in these two dockets, both dockets suffer from a number of common substantive and procedural defects. In particular, both dockets consider using the presence of the Internet Protocol (IP) as the basis for proposing sweeping changes in the Nation’s communications laws. Because the two dockets propose alternative paths to an identical end – namely the elimination of any common carrier obligations for the underlying transmission networks that all information service providers use to offer their services to the public – EarthLink addresses both dockets together in these consolidated reply comments.

The overly broad definition of “IP-enabled service” proposed by the Commission in the *NPRM*¹ and the similarly broad definition of “IP platform services” proposed by SBC in the *SBC Forbearance Petition*² make commenting difficult. To avoid confusion, EarthLink prefaces these reply comments by stating clearly that the Commission’s definition of “IP-enabled services” and SBC’s definition of “IP platform services” both encompass services which are properly classified as “telecommunications

¹ NPRM at ¶ 1 n.1.

² *Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services* (Feb. 5, 2004) at 28-29 (the “*SBC Declaratory Ruling Petition*”), filed as an attachment to the *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulations to IP Platform Services*, WC Docket No. 04-29 (filed Feb. 5, 2004) (the latter hereinafter referred to as the “*SBC Forbearance Petition*”).

services”³ as well as services which are properly classified as “information services”⁴ under the Communications Act. The public offering of IP services which merely provide for the transmission of information between or among points of a customer’s choosing without change in the form or content of the user’s information are “telecommunications services,” and IP services which provide for user interaction with stored information or provide the user with different or restructured information are “information services” under the plain language of the Communications Act and the Commission’s long-standing interpretations of that Act. As a result, some “IP-enabled” or “IP platform” services described in these two dockets are regulated common carrier services, and other IP-enabled or IP platform services are not. It is to the proper treatment of the common carrier IP-enabled or IP platform services⁵ that EarthLink addresses these consolidated reply comments.

Underlying the *NPRM* and the *SBC Forbearance Petition* is the fundamental assumption that the Commission is faced with a new, novel technology that is not addressed by the Communications Act and that therefore enables the Commission to craft out of whole cloth a new regulatory regime.⁶ As a result of this assumption, the *NPRM* and the *SBC Forbearance Petition*, along with many of the initial comments filed in both dockets, are largely devoid of any substantive legal analysis to support the proposed

³ See 47 U.S.C. § 153(46).

⁴ See U.S.C. § 153(20).

⁵ EarthLink generally refers to that subset of IP-enabled services that are common carrier services as “IP-based transmission services” or “IP-enabled transmission services.”

⁶ See *NPRM* at ¶¶ 4, 5, 42 and Statement of Chairman Michael K. Powell at 1. See also *SBC Declaratory Ruling Petition* at 41.

elimination of Title II common carrier obligations for IP-enabled transmission services through the classification of those services as “information services” under the Communications Act. This base assumption that the Act does not currently address these services is not correct, and as a result neither the *NPRM* nor the *SBC Forbearance Petition* provides a legally supportable basis upon which the Commission could issue a decision that would have the effect of eliminating the core common carrier obligations Congress established in the Communications Act.

The Commission’s own summary of the Internet demonstrates that the Internet Protocol is not a new technology that results in a radically different use of the Nation’s communications networks. As the Commission itself proclaims “[w]hile some may think the Internet is a new communication tool, its history is remarkably similar to other areas of communication. . . . In Internet terms, the elements to be shared were information and computing time, the common languages were data communications protocols, and *phone circuits carried it all.*”⁷ As the italicized text clearly indicates, at least the historians at the Commission clearly understand that the phone networks, also known as the public switched telephone network or PSTN, are the physical facilities that have long been used as the underlying transmission network for Internet traffic. By definition, any network that transmits Internet traffic, even dial up Internet traffic, must be “IP-enabled,” or the Internet traffic would not be able to reach its destination. In addition, the same document points out that the Transmission Control Protocol (TCP) was proposed in 1974, and was joined together with the Internet Protocol (IP) in 1978; that the Department of Defense

⁷ Federal Communications Commission, *The Internet: Looking Back on How We Got Connected to the World*, Summer 2004, p.1 (emphasis added). The document is available at <http://www.fcc.gov/omd/history/internet/documents/newsletter.pdf> (visited July 14, 2004).

adopted TCP/IP as its standard for packet-switched inter-networking in 1983; that Domain Name Server (DNS) conventions were adopted in 1984; that in 1991 all commercial restrictions on the use of the Internet were lifted by the U.S. government (which largely paid for the development of the Internet); that by 1994 there were over a million Internet hosts; and that the first Internet telephony (more commonly known as Voice over IP or VoIP) service was offered in 1995⁸ – the year before Congress adopted the landmark Telecommunications Act of 1996.

EarthLink thus returns to its fundamental point in its comments and these reply comments – namely that nothing in the plain language of the Communications Act as amended by the Telecommunications Act, nor the legislative history of those Acts, supports the suggestions made in the *NPRM* or the assertions made in the *SBC Forbearance Petition* that Congress did not address the proper treatment of IP-enabled transmission services or intended that those services would not be telecommunications services subject to the common carrier obligations of Title II of the Communications Act. Further, because IP-enabled transmission services are telecommunications services, the Commission may only forbear from applying the statutory common carrier obligations or any of its regulations regarding common carrier obligations through a properly noticed proceeding that meets the statutory tests set forth in section 10 of the Communications Act.⁹

⁸ *Id.* at 1-4.

⁹ 47 U.S.C. § 160.

1. The Tests Proposed in the *NPRM* and by Many Commentors Are Contrary to the Statute and Will Perpetuate Rather Than Resolve Legal Uncertainty.

The comments filed to date in this proceeding reinforce the fact that the Commission must resolve the fundamental issue of how IP enabled services will be classified before the Commission can address the further legal and policy questions identified in the *NPRM*. EarthLink agrees with many commenters that the definition of “IP-enabled services” in the *NPRM* encompasses a myriad of potential services, and the Commission will need to refine this definition to identify specific services before a proper classification decision can be made under the statutory definitions in the Communications Act. The Commission’s overly broad definition bears no relationship to the criteria used by Congress to classify services under the Act, and as a result has led the Commission and many commenters to suggest numerous “tests” for determining when a service should be considered a telecommunications service, with all other telecommunications-based services apparently being deemed to be information services by default.¹⁰ To the extent that these tests articulate criteria that are not in the statute, they are bound to be overturned in court, and were the Commission to adopt any of these tests it will merely prolong the very legal uncertainty that it purportedly seeks to resolve.

These proposed tests have two common themes: (1) they include criteria not found anywhere in the Communications Act or the Telecommunications Act, and (2) they seek to ensure that the party proposing the test will continue to have access to another party’s transmission facilities while providing the proposing party the ability to deny others access to its own transmission facilities.

¹⁰ See *NPRM* at ¶ 37, Comments of MCI, Inc. at 4, Comments of Comcast Corporation at 3, Comments of BellSouth Corporation at 7.

The most popular non-statutory criteria are (1) use of Internet protocols to transmit information, (2) use of North American Numbering Plan (NANP) numbers, and (3) interconnection with the Public Switched Telephone Network (PSTN), a term which neither the Commission nor almost any party felt it necessary to define. Despite pages of comments regarding the merits of these proposed criteria, neither the commenters nor the Commission in the *NPRM* has provided any explanation of the statutory basis for these proposed tests or the legal authority under which the Commission could add additional criteria to the statutory classifications specified by Congress. The first of the proposed criteria, use of the Internet protocols, is already addressed by the plain language of the statute, with a result that is opposite from what the proponents of that test urge. The other two criteria are bald attempts to add language to the statute, which the Commission cannot do, and in any event would only perpetuate or create regulatory disparity and arbitrage. EarthLink addresses each briefly below.

As EarthLink and others explained in their comments, the use of the Internet Protocol (IP), or the Transmission Control Protocol (TCP) in conjunction with IP (TCP/IP), to transmit information between or among points specified by the user does not create an “information service” under the plain language of the definitions adopted by Congress in 1996. TCP/IP is specifically designed to transmit a user’s information without change in the form or content of that information, a function that makes TCP/IP a component of the term “telecommunications.” Like all packet switched protocols, TCP/IP may process addressing information, transform information into different size packets for transmission, or access stored information necessary for the addressing and routing of the transmission, but Congress made clear that any manipulation of

information necessary for “the management, control, or operation of a telecommunications system” is excluded from the definition of “information service.”¹¹

The remaining two criteria, use of NANP numbers and interconnection with the PSTN, are two sides of the same coin. The PSTN, a term the Commission and most commentators appear to believe refers to a legally identifiable set of circuit switched networks that use Time Division Multiplexing to connect calls to NANP numbers, is an undefined term that appears nowhere in the Act. More specifically, neither that term nor anything like it appears in any of the relevant statutory definitions:

“telecommunications,” “telecommunications service,” and “information service.”

Moreover, Congress’ inclusion of the descriptive phrase “regardless of the facilities used” at the end of the definition of “telecommunications service”¹² clearly indicates that the type of transmission technology employed has no bearing on the regulatory classification of the service at issue. Instead, the statute is technologically neutral. Regulatory classifications are based on what a service does, not how it is provided.¹³

Likewise, it appears the Commission and proponents of using NANP numbers intend it as another way of defining a particular set of networks that use a particular technology. Once again, the intent appears to be to define a class that will ultimately disappear as packet switched networks replace circuit switched due to the inherent cost savings of packet technology. Not surprisingly, neither the Act nor the facts support use

¹¹ 47 U.S.C. § 153(20). *See also* Comments of Time Warner Telecom at 26 (“Congress excluded protocol conversion from the statutory definition of information services.”).

¹² 47 U.S.C. § 153(46).

¹³ *See also*, Comments of Sprint Corporation at 13-18.

of a particular database as a criterion for determining when a service is a telecommunications service or an information service. The NANP and cell phone databases serve the same function as that performed by the DNS database and the IP address databases – namely the mapping of a unique address for each node on a network.¹⁴ It is at best incongruous that the Commission would identify use of the DNS as indicative that a service is an information service, yet at the same time propose that use of another database that serves an identical function as indicative of a telecommunications service. The operations performed by these various databases are legally indistinguishable – neither set is tied to a particular geographic location (number portability means that the NANP is no longer geographically fixed for any number, and the whole purpose of the cell phone databases is to allow geographic freedom), and all of these various databases access continually updated information for the sole purpose of allowing information to be properly routed to the intended recipient. The outcome of the use of any non-statutory criteria would be continued legal uncertainty as the criteria are challenged, and most likely overturned, in court.

2. If the Commission Determines That Certain IP-Enabled Services Are Information Services Under the Communications Act, The Commission Has No Authority To Replicate Title II Regulations Under Title I For Those Services.

It seems axiomatic that the Commission would address the potential effects of the regulatory classifications it considers in the *NPRM*, most particularly the effect of classifying all IP-enabled services (including the underlying transmission) as information

¹⁴ See Frank J. Derfler, Jr. and Les Freed, *How Networks Work (6th Ed.)*, QUE, Indianapolis (2003) at 126-127 and Harry Newton, *Newton's Telecom Dictionary (20th Ed.)*, CMP Books, San Francisco (2004) at 267 (Definition of Domain Name Server).

services. If the Commission adopts use of Internet protocols as a determining factor in deciding that a service is not a telecommunications service, what does the Commission expect will happen when all networks have become “IP-enabled” and as a result there no longer are any “telecommunications services” being offered? What would be the practical impact of granting network operators absolute control over who may access their network, what services may be provided, and what devices may be attached? Based on EarthLink’s experience with cable, it is obvious that such a wholesale rejection of the principle of common carriage would result in non-facilities-based service providers being denied the transmission services that are required in order to deliver services to their customers. The resulting negative effects on competition and consumer choice are a simple matter of historical and continuing fact.

Perhaps in recognition of the fact that complete deregulation of the networks needed to provide services to the public would not protect consumers or promote competition, the Commission and numerous commenters have suggested that the Commission could use its “ancillary” authority under Title I of the Communications Act to craft an appropriate regulatory regime.¹⁵ To the extent that the regulatory requirements that would be imposed under such a regime are the same regulatory requirements that would be avoided by declaring all “IP-enabled services” to be information services, this approach is legally invalid.

The courts have permitted the Commission to use its Title I authority only in circumstances where the exercise of authority is “ancillary” to a core responsibility under

¹⁵ See, e.g., NPRM at ¶ 42; Comments of USTA at 33.

the Communications Act.¹⁶ To the extent that the Commission determines that IP Enabled Services are “information services” under the Act, there are no core responsibilities delegated by Congress to the Commission with respect to such services. Congress explicitly applied all of the obligations in Title II to common carriers and telecommunications carriers, and made it clear in the Communications Act that telecommunications carriers were to be treated as common carriers “only to the extent” that they are providing telecommunications services.¹⁷ In light of this explicit limitation, the Commission cannot expand the universe of services to which common carrier obligations apply to include services that the Commission has expressly determined are not telecommunications services. Where Congress has defined the classes to which certain rights and obligations apply, the Commission is obligated to follow the scheme the Congress created.

¹⁶ Numerous parties cite *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), in support of the proposition that the Commission can use Title I to impose selected Title II requirements on information services. *See, e.g.*, comments of USTA at 33 n.90; Comments of BellSouth at 30 n.104. That case does not support the result proposed by the parties that rely on it. The court in *Southwestern Cable* upheld the Commission’s regulation of cable television (at that time not expressly covered by the Act) on the basis that the regulations adopted were necessary to effectively fulfill its regulatory responsibilities with respect to television broadcasting, a service over which the Act did give the Commission explicit authority. *Southwestern Cable*, 392 U.S. at 178. Here, neither the Commission nor any commenter has yet identified the express power to which the proposed exercise of the Commission’s Title I authority would be “ancillary,” i.e., what express responsibility under the Act would be fulfilled by first removing services from Title II through definitional sleight of hand and then re-imposing under Title I the same regulations made inapplicable by that definitional action.

¹⁷ 47 U.S.C. § 153(44).

3. The Commission's Order Regarding pulver.com's Free World Dialup Service Has No Applicability Beyond Its Specific Facts.

Numerous comments cite the Commission's order regarding pulver.com's Free World Dialup service,¹⁸ typically in support of the proposition that some or all IP-based services are solely "information services" under the Communications Act.¹⁹ EarthLink respectfully cautions the Commission against using the *Pulver Order* as a means of short-handling the analysis necessary to deciding the much broader and more factually difficult issues raised in the NPRM. For several reasons, the *Pulver Order* does not have any precedential weight.

First, the *Pulver Order* on its face is limited to the specific facts of that case:

We reach our holdings in this Order based on FWD as described by Pulver in its petition and subsequent ex partes. We thus limit the determinations in this Order to Pulver's present FWD offering (only to the extent expressly described below), without regard to any possible future plans Pulver may have. See, e.g., Bellsouth Comments at 4 &n.13 (quoting Pulver press statement about eventually charging a fee); USTA Reply at 4 (citing SBC Comments at 2 that FWD may eventually enable calls to users outside the FWD community). Furthermore, this declaratory ruling addresses FWD only to the extent it facilitates free communications over the internet between one on-line FWD member using a broadband connection and other on-line FWD members using a broadband connection.²⁰

In addition to this express limiting statement, the Commission's *Pulver Order* has no precedential value because its holding that the service there at issue is an information

¹⁸ *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (hereinafter the "*Pulver Order*").

¹⁹ See, e.g., Comments of Level 3 Communications LLC at 12; Comments of Vonage Holdings Corp. at 27-28.

²⁰ *Pulver Order*, 19 FCC Rcd at 3308 n.3.

service is classic *obiter dictum*. The petitioner asked only that the Commission declare that Free World Dialup is not “telecommunications” or a “telecommunications service.”²¹ The Commission’s notice seeking comment on the *Pulver Petition* states that the petitioner seeks “a declaratory ruling that its Free World Dialup, which facilitates point-to-point broadband Internet protocol voice communications, is neither telecommunications nor a telecommunications service as those terms are defined in section 153 of the Telecommunications Act of 1996.”²² Indeed, pulver.com itself expressly stated that “it does not seek an affirmative ruling that FWD is an information service.”²³ The Commission’s order, however, nevertheless gratuitously reached the information service issue.

Presumably the Commission has no intention of relying on the *Pulver Order* as somehow controlling the outcome of the present docket. Were it otherwise, there would be no need for the current proceeding. In light of the numerous references to the *Pulver Order* in the comments filed to date, however, EarthLink wishes only to note that any attempt to use that decision as binding precedent could unnecessarily undermine the validity of any Commission order in the present docket.²⁴ Any ultimate decision arising

²¹ *Pulver Petition* at 1.

²² FCC Public Notice Establishing Pleading Cycle in WC Docket No. 03-45 (Feb. 14, 2003).

²³ *Ex parte* letter in WC Docket No. 03-45 from Susan Hafeli to Marlene H. Dortch (December 11, 2003).

²⁴ As EarthLink noted in its initial comments in WC 04-36 (p.14 n.16), EarthLink believes that the Commission’s determination that FWD is not a telecommunications service is clearly correct, because no fee is charged for the service. To the extent that the Commission’s determination that pulver.com does not provide “telecommunications” is based solely on the fact that the physical transmission involved in FWD is provided by another entity, EarthLink notes that such a rationale is inconsistent with the Commission’s historical treatment of resellers. What is clear by definition is that there must be telecommunications somewhere if there is an information service, and EarthLink urges the Commission to make sure that the nature and source of that

out of this proceeding should stand on its own record and its own clearly articulated reasoning.

4. The SBC and Other Forbearance Requests Must Be Denied.

EarthLink filed comments in WC Docket No. 04-29 in response to the SBC Forbearance Petition, which requested that the Commission forbear from the application of Title II to “IP-Platform Services.”²⁵ For the reasons stated in EarthLink’s earlier filing, and for the reasons stated in the comments of AT&T and others in that docket, it is plain that the SBC forbearance petition is facially deficient and should be summarily and promptly denied. There is nothing new that needs to be said about the merits of the petition; the record clearly requires denial. For the avoidance of any doubt, however, EarthLink notes that its opposition to the SBC Petition extends not only to the SBC-provided services and networks covered by that forbearance request, but also extends to the forbearance request as it applies to the transmission component of all “IP-Platform Services,” whether such services are offered over wireline, fiber, cable, wireless, or any other medium. The SBC Petition is exceedingly broad in its scope, and EarthLink respectfully urges the Commission to be clear that it is denying the petition in its entirety.

Other commenters have supported the SBC Petition or have independently suggested to the Commission that forbearance from Title II regulation is appropriate for IP-Enabled Services. These requests must be denied as well.

telecommunications is identified with respect to any services that fall within the “information service” definition. What cannot be the case is that there is an information service but that no entity is identified as providing the underlying transmission. Finally with respect to the scope of the *Pulver Order*, EarthLink notes that FWD is a much more limited offering than many of the services potentially covered by the Commission’s term “IP-Enabled Services,” and that qualitative difference may be of determinative importance for classification purposes.

²⁵ See *SBC Forbearance Petition* at 1.

BellSouth Corporation (“BellSouth”) appears to ask that the Commission forbear from *all* Title II requirements, although it never specifically identifies which regulations it is talking about or attempts to apply the section 10 forbearance criteria mandated by Congress. Indeed, BellSouth’s entire argument in support of its forbearance request consists of references to SBC’s plainly inadequate petition.²⁶ Those inadequate SBC arguments gain no weight through BellSouth’s paraphrase of them.

The United States Telecom Association (“USTA”) also suggests forbearance, although it, like BellSouth, has not filed a petition requesting that relief. In a scant three-page discussion, USTA purports to apply the three-part conjunctive forbearance test, but in reality USTA merely repeats the statutory criteria and then concludes without analysis that they are met. Like the SBC Petition, the USTA comments fail to identify which regulations it believes the Commission should forbear from enforcing,²⁷ fails to define the relevant product and geographic markets, fails to provide any evidence to support its conclusory assertions about the level of competition, and fails even to mention the negative public interest impact of removing the section 201 and 202 protections that prevent network operators from denying essential transmission services to other telecommunications carriers and information service providers.

Although USTA offers no facts in support of its brief comment on forbearance, it does make passing reference to the so-called “Fact Report” filed in WC Docket No. 04-36 by the law firm of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.²⁸ This

²⁶ See BellSouth Comments at 59-62.

²⁷ The request is simply for forbearance from application of “Title II economic regulation. . . .” USTA Comments at 22.

²⁸ See USTA Comments at 22.

document (hereinafter the “*Kellogg, Huber Report*”) is also cited by other ILEC commenters.²⁹ With due respect to its authors, that document is neither factual nor a report. The authors of the document are two attorneys from the firm that is also counsel to the Verizon Telephone Companies (“Verizon”) in this proceeding. Setting aside whether the Advisory Committee note regarding imputed disqualification could save the *Kellogg, Huber Report* and/or the Verizon comments from being stricken under Rule 3.7 (Lawyer as Witness) of the District of Columbia Rules of Legal Ethics, the Commission should at a minimum recognize the *Kellogg, Huber Report* for what it is: argument by counsel for a party.

On the merits of the *Kellogg, Huber Report*, there is absolutely nothing in that document (nor could there be) that contradicts the Commission’s own findings that, as of December 2003, 92% of high-speed lines were cable and ADSL, with 95% of the ADSL lines provided by ILECs.³⁰ The *706 Report* also reveals that 6.8% of ZIP codes had no broadband service, 14.9% of ZIP codes had only one broadband provider, and that 17.1% of ZIP codes had two providers.³¹ Thus, over 38% of the nation receives broadband (if at all) under duopoly or less competitive conditions. The *706 Report* does not indicate what percentage of the lines that are provided by non-ILEC and non-cable company providers are lines that depend on the facilities of ILECs and cable companies. Alternative providers using cable lines are presumably relatively low, because cable companies have, with limited exceptions imposed by merger-related conditions, refused

²⁹ See, e.g., BellSouth Comments at 11.

³⁰ *High Speed Services for Internet Access: Status as of December 31, 2003*, Industry Analysis and Technology Division (June 2004) at Chart 1 and p.3 (hereinafter the “*706 Report*”).

³¹ *706 Report* at Table 12.

to sell broadband transport to unaffiliated ISPs. The number of lines reported by non-ILEC providers but that are dependent in whole or part on ILEC facilities, on the other hand, is no doubt quite large, because even large facilities-based broadband CLECs like Covad require extensive interconnection with ILEC facilities. This means that, if ILECs were excused from their section 201 and 202 obligations as they request here (in addition to the section 251(c)(3) relief that the Commission has already granted), the monopoly/duopoly situation that clearly applies today in almost 40% of ZIP codes³² would prevail in virtually all areas of the country. Under neither current circumstances nor under the circumstances that the ILECs seek does there exist the “highly competitive” market that USTA claims,³³ but for which it offers absolutely no factual support.

Most fundamentally, USTA nowhere acknowledges that its request appears to include forbearance from the core section 201 and 202 requirements to sell service on reasonable and nondiscriminatory terms upon request, provisions that the Commission has never waived, even in the presence of real competition. Having failed even to acknowledge that its request is essentially one to wholesale vitiate Congress’ chosen regulatory regime with respect to the common carrier components of IP-enabled services, USTA, like the other supporters of forbearance, also fails to offer any analysis whatsoever as to how the section 10 criteria could be satisfied so as to justify such a sweeping action.³⁴

³² There is nothing in the record, of course, that indicates that ZIP codes would be appropriate boundaries of geographic markets. This is simply the smallest geographic area for which data is readily available on a national basis.

³³ USTA Comments at 22.

³⁴ Some commenters suggest that the Commission adopt a “belt and suspenders” approach to deregulating IP-based telecommunications service. Under that approach, the Commission is

5. The Requests for Waiver of the *Computer Inquiry* Rules Must Be Denied.

Related to the various statements in support of elimination of even core Title II safeguards through the use of the section 10 forbearance authority are the requests by mostly the same parties for the Commission to “waive” the *Computer II/Computer III* requirements.³⁵ These requests must be denied for several independent procedural and substantive reasons.

Procedurally, EarthLink notes that the Commission’s rule encompassing waiver states that the Commission’s rules “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.”³⁶

Absent exigent circumstances, the Administrative Procedure Act requires *Federal Register* notice in advance of substantive regulatory action.³⁷ The NPRM, however, says

urged both to declare that such services are “information services” and also to declare that, if the Commission is wrong, and IP-based transmission services are in fact “telecommunications services,” the Commission forbears from applying common carrier regulations. *See, e.g.,* Comments of Time Warner at 25. The proposal is legally unsupportable, because its adoption would require that the Commission simultaneously adopt two legally inconsistent classifications for IP-enabled transmission services. Parties have the luxury (albeit sometimes unpersuasively) of arguing in the alternative. Administrative agencies, on the other hand, are expected to make decisions. If the Commission were to adopt the suggested approach, it would run the risk of being overturned on appeal as having engaged in arbitrary and capricious decision-making. *See Mid-Tex Elec. Co-Op., Inc. v. F.E.R.C.*, 773 F.2d 327, 353 (D.C. Cir.1985) (“We obviously cannot affirm a decision based on three different and inconsistent answers to the same fundamental questions.”). In addition to the legal problems with such an approach, it would have severe practical difficulties, because unless the regulated industry understands the rationale behind a Commission decision, that decision provides no guidance for the future, and the laudatory goal of regulatory certainty is lost.

³⁵ *See, e.g.,* Comments of USTA at 28-31; Comments of Time Warner Inc. at 3, 25; Comments of BellSouth at 37-41; Comments of Verizon at 21-24.

³⁶ 47 C.F.R. § 1.3 (emphasis added).

³⁷ *See* 5 U.S.C. § 553.

nothing about waiver of the *Computer Inquiry* rules or waiver of any other rules. If the Commission were to consider taking such action, it would first need to publish notice in the *Federal Register* describing the action proposed and the reasons behind the proposal and obtain public comment. That has not been done here.

Setting aside the lack of any Commission notice³⁸ to date with respect to possible “waiver” of the Commission’s *Computer II/Computer III* rules, section 10 of the Act sets forth the sole means by which the Commission may choose not to enforce its regulations as they apply to common carriers. That section states in relevant part that:

Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying *any regulation* or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of their geographic markets, if the Commission determines 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.³⁹

Section 10 governs the Commission’s authority to forbear both from applying provisions of the Communications Act and also from applying the Commission’s

³⁸ That a party has raised an issue does not constitute notice by the agency to the public that action on such an issue might be taken. If such a mention by a party were deemed to satisfy the Administrative Procedure Act’s public notice requirements, then private parties, not the agency, could define the scope of proceedings and force other parties to address myriad issues that are not in fact under consideration by the agency.

³⁹ 47 U.S.C. § 160(a).

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.⁴⁰ Accordingly, “waiver” is no longer an option if the Commission seeks to suspend performance of its regulations adopted under the *Computer II/Computer III* proceedings. Instead, the Commission must proceed, if at all, under section 10.

More substantively, the commenters urging waiver of the *Computer II/Computer III* rules in fact seek relief from the requirement that they provide the common carrier transmission services underlying their information service offerings to other carriers and information service providers on reasonable and nondiscriminatory terms. After the enactment of the Telecommunications Act of 1996, this nondiscriminatory service requirement with respect to the transmission underlying information services is clearly a requirement of the statute itself under the definitions of the terms “information service,” “telecommunications,” and “telecommunications service” and sections 201 and 202 of the Communications Act.⁴¹ If the telecommunications inherent in any given information

⁴⁰ 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).

⁴¹ 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,” “telecommunications carrier,” “information service,” “telephone exchange

service is offered for a fee to the public (either alone or as part of a bundled service), it is a “telecommunications service,”⁴² i.e., a common carrier service subject to sections 201 through 203 of the Communications Act.⁴³ Relief from the requirement to provide telecommunications service on reasonable and nondiscriminatory terms, therefore, is available only under section 10 of the Act, and no party has made anything like the substantial showing necessary to support forbearance from this core requirement.⁴⁴

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 Cable Modem Declaratory Ruling* at ¶ 34 n.139 (basic/enhanced distinction incorporated into 1996 Act).

⁴² *See* 47 U.S.C. § 153(46); *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120, 1132 (9th Circuit 2003).

⁴³ 47 U.S.C. §§ 201-203.

⁴⁴ Verizon acknowledges that the *Computer II/Computer III* rules embody what are today clear statutory common carrier obligations, stating that “[t]he *Computer Inquiry* rules are essentially a roundabout way of imposing common carrier requirements on IP-Enabled services.” Verizon Comments at 24. Congress eliminated the “roundabout” when it passed the Telecommunications Act of 1996 and clarified and codified the relationships among “information service,” “telecommunications,” and “telecommunications service.” The remainder of the Verizon comments on the *Computer Inquiry* issue consists of the same sorts of unsubstantiated conclusions about the level of competition in broadband transport as are made by the other ILEC interests. On a related point, Verizon urges that all providers of IP services be found to be “non-dominant.” Verizon Comments at 25. This issue as it applies to ILECs is already the subject of an extensive record in WC Docket No. 01-337, and this issue must therefore be dealt with in that proceeding. On the merits of this point, EarthLink notes simply that Verizon relies here on the same conclusory and inaccurate statements regarding competition as it does with respect to the forbearance and waiver issues. The arguments are no more availing in this context.

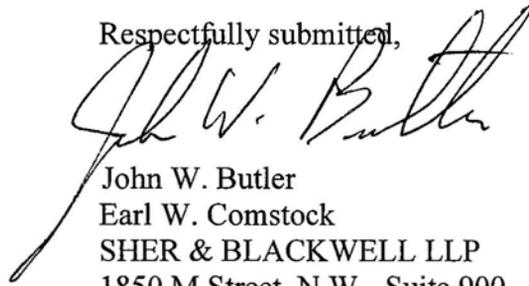
As EarthLink has noted previously, the single most important issue raised by this proceeding is the extent to which the networks that are essential for any entity to provide IP-enabled services will be available to all service providers who are willing to pay a fair price to use them. That issue remains whether or not certain IP-based applications are found to meet the Act's definition of "information service." As the plain language of the Act and *Brand X* make clear, every information service is provided via telecommunications, and when that telecommunications is offered for a fee to the public, it is a telecommunications service. Telecommunications services are by definition common carrier services subject to sections 201 and 202 of the Act.⁴⁵ Any party (or the Commission acting on its own initiative in a properly noticed proceeding) seeking forbearance from sections 201-203 with respect to networks that use IP must (1) acknowledge that the grant of such forbearance would mean that the network owners would have the legal right to exclude all other service providers from using those networks, and (2) demonstrate that such a restrictive and anticompetitive result would promote competition and protect the public interest. No party seeking forbearance or waiver has dared to acknowledge the real-world effect of forbearance in these circumstances, and no party has come close to showing why that effect would be either desirable as a policy matter or legal under the Act. If the Commission intends to consider forbearance of the type requested, the Commission must address these fundamental questions despite the failure of forbearance proponents to do so.

⁴⁵ See 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. . . .").

6. Conclusion.

For all of the reasons stated above and in EarthLink's initial comments, EarthLink respectfully requests that the Commission (1) promptly and completely deny all of the petitions and other requests for forbearance and waiver from application of the common carrier requirements of Title II and the *Computer Inquiries* applicable to IP-enabled telecommunication services, and (2) issue an amended notice of proposed rulemaking that explicitly and transparently states the Commission's position regarding the applicability of common carrier regulation to IP-based transmissions services that are offered for a fee to the public, either on a stand-alone basis or as part of a bundle that also includes information services. To the extent that the Commission may conclude that such transmission services are not common carrier services, EarthLink urges the Commission to provide a complete legal analysis supporting its position and to provide an explanation of how the Commission believes such a determination will affect competition and consumer choice in the markets for telecommunications services and information services.

Respectfully submitted,



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

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