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December 21, 2004

EX PARTE

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

Re: Ex Parte Presentation: WC Docket No. 04-36; WC Docket No. 04-29; WC Docket 04-405.

Dear Ms. Dortch:

On December 20, 2004 Dave Baker, Vice President of Law and Public Policy for EarthLink, and Earl Comstock and John Butler of Sher & Blackwell LLP met with Tom Navin, Julie Veach, Russell Hanser, and Christi Shewman of the Wireline Competition Bureau. In the meeting, EarthLink emphasized the following four points from its comments and reply comments in WC Docket No. 04-36:

1. The IP-Enabled NPRM incorrectly assumes that the presence or absence of the TCP/IP protocol suite is relevant to the regulatory classification of any given service. EarthLink reiterated that the Internet Protocol is simply one of many network transmission protocols. As such, it is not a service in itself, but is simply a tool for managing transmission across a network or networks.

2. The IP-Enabled NPRM erroneously suggests that there are myriad "IP networks" that are physically separate from existing physical transmission networks. That erroneous suggestion leads to the incorrect conclusion that there is far more competition for broadband transmission services than in fact there is. EarthLink reiterated that well in excess of 90% of all broadband connections today are provided over either cable lines or DSL lines, and that customers served by cable generally have no choice of ISPs, with the exception of Time Warner markets subject to the FTC's merger condition arising from the combination of AOL and Time Warner.

3. Although the IP-Enabled NPRM considers the possibility of designating all "IP-Enabled" services as "information services," thus removing them from all common carrier obligations under Title II of the Communications Act, the NPRM does not discuss the economic, policy, legal, or public interest implications of taking such a drastic step. In

this regard, EarthLink urged that if the Commission is considering issuing a rule that essentially removes Title II from the Communications Act, it has an obligation to discuss that possibility directly and in detail.

4. The NPRM in fact proposes no rules, and gives so little indication of the Commission's future direction that it fails to provide the notice legally required under the Administrative Procedures Act. Accordingly, if the Commission is to issue any final rule in this docket, it must first publish adequate notice of the rule that it proposes to adopt. Any rule arising directly out of the notice as originally published would be subject to judicial reversal on the notice issue alone.

In addition to these points related to Docket 04-36, EarthLink also noted that the forbearance petitions filed by SBC and BellSouth failed to provide any basis for granting the broad relief there requested. Those petitions seek forbearance from all requirements of Title II and the *Computer Inquiry* requirements, but they nowhere identify or discuss the particulars of any of the obligations from which they seek relief, and they fail even to attempt to apply the section 10 criteria to the purposes and policies of the numerous rules and statutory sections from which they seek relief. EarthLink noted that the petitions by their terms seek relief from the core common carrier obligations of sections 201 and 202 of the Act, provisions from which the Commission has never forborne. Given that these provisions are the foundation of the Communications Act, EarthLink noted that any forbearance from those provisions would require an exceptionally strong legal and factual justification. The record in both proceedings falls far short of that standard, and indeed consists almost entirely of the sorts of platitudes and unsupported conclusions that the Commission has consistently found inadequate to support forbearance.

If you have any questions regarding this notice, please contact the undersigned at 202-463-2510.

Sincerely,

John W. Butler
Counsel for EarthLink, Inc.

Cc: Tom Navin
Julie Veach
Russell Hanser
Christi Shewman