Before the
Federal Communications Commission
Washington, D.C. 20554

	)	
In the Matter of	)	
	)	CC Docket No. 01-92
Developing a Unified Intercarrier	)	
Compensation Regime	)	

REPLY COMMENTS OF EARTHLINK, INC.

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EarthLink, Inc. ("EarthLink"), by its attorneys, files these reply comments in the above-captioned rulemaking proceeding in which the Federal Communications Commission ("FCC" or "Commission") seeks to reexamine all aspects of regulated intercarrier compensation.[1] EarthLink is one of the nation's leading Internet Service Providers ("ISPs") with approximately 5.4 million customers and a provider of IP-enabled services, including voice services ("VoIP"). As such, EarthLink has an interest in assuring that reform promotes efficient and innovative IP-enabled services, does not inappropriately impose legacy access charges on EarthLink's information services, and does not impede EarthLink's ability to serve its customers efficiently and cost-effectively.

INTRODUCTION AND SUMMARY

EarthLink supports reform of the current intercarrier compensation mechanisms. As many have noted, customers and vendors should see actual benefits through reduction in the prices of network access as technology prices fall and new innovations lower network owner's

[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (rel: March 3, 2005) ("*Further Notice*").

costs, especially those of incumbent local exchange carriers ("LECs"). The public interest will be served by reform that meets the objectives of a cost-based system. EarthLink urges the Commission to ensure that its reform meets the goals the FCC has articulated throughout this proceeding: the new regime must ensure economic efficiency; preservation of universal service must be a priority; the new regime must be competitively and technologically neutral; the Commission should ensure it has ample legal authority to create the new regime; and carriers, ISPs, and customers must be given an adequate transition plan for any significant reform.[2]

As a threshold matter, the FCC must ensure a new regime promotes economic efficiency by dictating that IP-enabled traffic will not be singled-out from other services for special or adverse treatment. Second, the FCC should reaffirm its sound policy to not subject ISPs to interexchange carrier access charges, which furthers the Commission's interest of ensuring deployment of new services. The FCC must also retain V-NXX arrangements. Removal of this policy could result in increased consumer costs, impede rural consumers ability to gain access to the Internet, and frustrate local competition. Finally, the FCC must assess the impact its new compensation regime will have on large end-users, and provide for "fresh look" renegotiations, so that even customers in long-term contracts can negotiate terms consistent with new compensation rules.

I. INTERCARRIER COMPENSATION REFORM SHOULD NOT SINGLE OUT IP-ENABLED TRAFFIC FOR EXPEDITED OR SPECIAL TREATMENT

At the outset, the FCC should ensure that the rules of intercarrier compensation are first cost-based and then traffic neutral (e.g., whether interexchange, local voice, or IP-enabled traffic). As the Commission has already determined, it "sees no reason to impose different rates

[2] *See Id.* ¶¶ 29-36.

for ISP-bound and voice traffic" and that "[t]he record developed. . . fails to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP."[3] Since that time, while some parties, such as Qwest and SBC Communications, continue to insist that ISP-bound traffic should be treated separately, there are no legitimate differences in cost between voice traffic and IP-enabled traffic. Under these circumstances, there is no rational economic or policy reason to distinguish among them. Accordingly, the FCC should conclude that a new intercarrier compensation regime serves the public interest, but it should not and cannot arbitrarily single out IP-enabled traffic for differential treatment under a new regime.

Reform of the compensation scheme to treat all traffic neutrally will harmonize the system and allow a move toward a scheme based on cost-causation. Instituting a traffic neutral regime also furthers the Commission's goal of economic efficiency since a system that sends accurate cost signals to users (rather than an unrealistic, uneconomic picture of costs) promotes efficient use of technology, and bests ensures that end users will actually benefit from the falling costs of technology. Therefore, however the Commission decides to reform rate structures and rate levels for traffic from Point A to Point B, it should not do so piecemeal by singling out IP-enabled traffic. In fact, a move in a non-traffic neutral direction would be a step backwards since the FCC and the states are otherwise moving to derive uniform, economically-efficient rates based on costs, not distinctions driven solely by regulatory fiat.[4] Not only would a policy shift

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[3] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶¶ 90-94 (2001) (*"ISP Order on Remand")*.

[4] *Further Notice***,** ¶¶ 29-37; Comments of the Alaska Office of State at p. 5 (May 23, 2005); Comments of the Alaska Regulatory Commission at pp. 6-8 (May 23, 2005); Comments of the State of Hawaii at pp. 1-2 (May 23, 2005); Comments of the Iowa Telecommunications

targeted at singling out IP-enabled traffic arbitrarily and needlessly complicate already complex issues (e.g., by requiring new traffic identification methods), such a step could also have negative consequences for IP-enabled traffic and usage, interfering with economically efficient price signals generally and dampening demand and innovation of new services and technologies.

For these reasons, the FCC should also now act to clarify that, pending reform, ISP-bound traffic should be subject to reciprocal compensation under Section 251(b)(5) of the Act and reject arguments to subject the traffic to a different compensation scheme pursuant to Section 201 of the Act, as some have suggested.[5] Thus, the FCC should reject SBC's suggestion that the Commission impose a bill-and-keep system on ISPs even if the FCC is not prepared to apply bill-and-keep to all traffic yet.[6] Likewise, the FCC should reject the suggestion of Qwest urging a "special ISP rule" under Section 252(b)(5) authority that would immediately change the existing compensation rules for ISP-bound traffic only.[7] Further, while Verizon suggests that reciprocal compensation under Section 251(b)(5) can only apply to traffic exchanged between LECs, arguing that therefore reciprocal compensation cannot apply to any other traffic,[8] there is

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Association at p. 6 (May 23, 2005); Comments of the Iowa Utilities Board, p. 2 (May 23, 2005); Comments of the Missouri Public Service Commission at p. 9 (May 23, 2005); Comments of the New Jersey Board of Public Utilities at p. 3 (May 23, 2005); Comments of the North Dakota Public Service Commission at p. 3 (May 23, 2005); Comments of the Ohio Public Utilities Commission at pp. 13, 16-20 (May 23, 2005); Comments of the South Dakota Telecommunications Authority at p. 3 (May 23, 2005); Comments of the South Dakota Public Utilities Commission at pp. 3-5 (May 23, 2005); Comments of the Texas Office of Public Utility Counsel at p. 16 (May 23, 2005); Comments of the Wisconsin Public Service Commission at p. 2 (May 23, 2005); Comments of the Wyoming Public Service Commission at p. 3 (May 23, 2005).

[5] Comments of Qwest Communications International at pp. 56-57 (May 23, 2005); Comments of SBC Communications at p. 24; Comments of Verizon at Attachment B (May 23, 2005).

[6] Comments of SBC Communications at pp. 23-24 (May 23, 2005).

[7] Comments of Qwest Communications International at pp. 57-58 (May 23, 2005).

[8] Comments of Verizon at pp. 8-9 (May 23, 2005).

nothing in the statute that would preclude including ISP-bound traffic within Section 251(b)(5). Given the record evidence supporting treatment of ISP-bound traffic like local traffic, the need to resolve the *ISP Remand* issues, and the pendency of comprehensive intercarrier compensation reform, the most appropriate course at this time is to clarify that ISP-bound traffic falls within Section 251(b)(5).

II. ISPS SHOULD NOT BE SUBJECT TO INTEREXCHANGE CARRIER ACCESS CHARGES

EarthLink supports the comment filed by the Information Technology Association of America and urges the Commission to reject calls to require ISPs to pay interexchange carrier access charges.[9] For over two decades, the FCC has addressed the issue of whether ISPs should be subject to interexchange access charges. Each time the FCC looks, it continues to find that ISPs should not be subject to these carrier charges. The Commission's consistent approach has proved to be sound policy and has furthered the Commission's interest in encouraging deployment of new services.[10]

Notably, since adopting this course, the Commission has repeatedly found that ISPs should not pay interexchange carrier access charges and there is nothing new in the record to indicate the Commission should now reconsider this long-standing and successful approach.[11]

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[9] Comments of Information Technology Association of America (May 23, 2005).

[10] 47 U.S.C. ¶ 230 (b).

[11] *Further Notice*, ¶ 7, fn. 18 ("This policy… has been reviewed by the Commission on a number of occasions and retained each time."); *See In the Matter of MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, ¶ 83 (1983) ("Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability."); *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd. 2631, ¶ 1 (1988) ("We have decided not to eliminate the [ESP] exemption from interstate access charges currently permitted enhanced service providers

Under the Commission's approach, ISPs have been appropriately and consistently held to be "end users," rather than carriers, and therefore not required to pay interstate access charges as carriers.[12] Instead, ISPs pay heavily for access and universal service in the same way as other end users – through the costs of the incumbent LEC access services, subscriber line charges, Universal Service Fund pass-throughs, etc. While some advocate changing this framework,[13] there is no justification for singling out ISPs from all other end users and ISPs should not now have additional obligations to incumbent LECs that are not applicable to other end users. Moreover, since the FCC has determined that carriers do not incur a higher cost when traffic is delivered to ISPs user than when traffic is delivered to any other end,[14] ISPs should continue to pay the same rates that all other end users pay.

III. THE FCC SHOULD FIND V-NXX ARRANGEMENTS SERVE THE PUBLIC INTEREST

The FCC should also reject calls to eliminate the use of "virtual NXX" ("V-NXX") arrangements used to facilitate consumer access to ISPs.[15] As has been noted, such arrangements

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at this time."). *See also, In the Matter of Access Charge Reform Order*, First Report and Order, 12 FCC Rcd. 15982 (1997).

[12] This fact is even supported by Qwest (stating in its comments that the "ESP Exemption" clarifies that ESPs and ISP POPs are treated as end users for interconnection and carrier purposes.) Comments of Qwest Communications International at p. 15 (May 23, 2005). In addition, SBC does not even deny that this policy applies to ISPs, but rather encourages the FCC to not extend the policy to VoIP providers. Comments of SBC Communications at pp. 18-19 (May 23, 2005).

[13] Expanded Portland Group, A Comprehensive Plan for Intercarrier Compensation Reform, CC Dkt. 01-92 (filed Nov. 2, 2004).

[14] *ISP Order on Remand* ¶ 91.

[15] EarthLink notes that the treatment of ISP-bound traffic using V-NXX arrangements has been settled previously by the Commission in the *ISP Remand Order*. There, the FCC established a compensation scheme for *all* ISP-bound traffic, making no distinction between V-NXX traffic and other ISP-bound traffic. *ISP Order on Remand*, ¶ 92-93. Thus, while some incumbent LECs urge the FCC find that such traffic is interexchange traffic subject to access charges, what

promote the public interest by fostering affordable, ubiquitous Internet access for all Americans, regardless of where they live by reducing the cost of, and promoting competition for, Internet access in all areas.[16]

In considering the treatment of V-NXX in connection with ISP-bound traffic, the FCC should be mindful of the role it plays in ensuring that consumers in rural areas have affordable Internet access by providing end users with a local presence, and the FCC should find that the use of V-NXX arrangements to serve ISPs furthers the important Communications Act policy of promoting affordable, ubiquitous Internet access for consumers living in sparsely populated areas.[17] As such, the FCC should retain its successful policy of widespread, affordable Internet access for all Americans and declare that V-NXX arrangements in the context of ISP-bound traffic serve vital policy goals.

IV. FCC SHOULD ASSESS THE IMPACT OF COMPENSATION RULE CHANGES ON LARGE END-USERS AND ALLOW "FRESH LOOK" RENEGOTIATIONS

Finally, the FCC should consider the impact a new intercarrier compensation regime will have upon existing large customers such as ISPs. As such, EarthLink supports the comments of Ad Hoc Telecommunications User Committee proposing that to provide a better adjustment to a new compensation regime, the FCC should provide end-users the opportunity to give existing contracts a "fresh look" and to renegotiate more favorable terms consistent with new

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they really seek is untimely reconsideration of an issue already settled. *See* 47 U.S.C. § 405 (Petition for Reconsideration must be filed within thirty days from public notice of the order).

[16] Comments of CompTel/ALTs at p. 18 (May 23, 2005).

[17] "Access to. . . information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2).

Commission rules.[18] As suggested, should renegotiation not be possible the FCC should allow end-users to terminate the contracts without liability.

The FCC has often provided a fresh look where, like the present circumstances, regulatory changes could not have been foreseen when the contract was signed or the contract inhibits competition by putting one party at a disadvantage.[19] For example, in the *1997 Universal Service Reform Order*, the FCC clearly approved of a "fresh look" where the "expense or cost of doing business [was] not anticipated at the time contracts were signed."[20] The FCC reiterated this opinion most recently when considering changes in the recovery of universal service charges that could prevent some contributors from recovering those charges under existing contracts.[21] Given the scope of the proposed intercarrier compensation reform, allowing a "fresh-look" will promote reasonable behavior by ensuring parties may adjust to rate changes in existing, long-term contracts.

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[18] Comments of Ad Hoc Telecommunications User Committee at pp. 23-24 (May 23, 2005).

[19] *See, e.g., In the Matter of Federal and State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 851 (1997), as corrected by Errata, FCC 97-157 (1997), *affirmed in part, reversed in part and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d. 393 (5th Cir. 1999); *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 7341 (1993).

[20] *See* 12 FCC Rcd. 8776, ¶ 851 (1997).

[21] *In the Matter of Federal and State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd. 24952, ¶ 59 (2002) ("the recovery limitations adopted herein constitute a change in universal service policy that was not anticipated at the time existing contracts were signed . . . . Therefore, we conclude contributors should be . . . permitted to renegotiate contractual terms . . . .").

CONCLUSION

EarthLink urges the Commission to take the aforementioned steps in this proceeding to attain economic efficiency, support policies that promote a competitive marketplace, and encourage affordable and ubiquitous IP-enabled services.

Respectfully submitted

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** Admitted only in Maryland; approval for practicing law in the District of Columbia pending.*