



Rolla Huff
Chairman & Chief Executive Officer

October 28, 2008

The Honorable Kevin Martin
Chairman

The Honorable Michael J. Copps
Commissioner

The Honorable Jonathan S. Adelstein
Commissioner

The Honorable Deborah Taylor Tate
Commissioner

The Honorable Robert M. McDowell
Commissioner

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Presentation in CC Docket No. 99-68, Intercarrier Compensation for ISP-Bound Traffic; CC Docket No. 01-92, Developing a Unified Intercarrier Compensation Regime.

Dear Chairman Martin & Commissioners:

I am writing to express EarthLink's concern that the expected decision of the Federal Communications Commission ("Commission") on ISP-bound traffic will fail to satisfy the D.C. Circuit's writ of mandamus and create more uncertainty and instability in the Internet access market.¹ A Commission order that either continues to distinguish ISP-bound traffic from other kinds of traffic for intercarrier compensation purposes or requires an unreasonably long transition period will fail to withstand the inevitable

¹ EarthLink has actively participated in the Commission's intercarrier compensation proceedings. See, e.g., *Ex Parte* Presentation of EarthLink, Inc., CC Dockets Nos. 99-68 and 01-92, dated Aug. 14, 2008 ("EarthLink August 14 *Ex Parte*"); Notice of *Ex Parte* Communication by EarthLink, Inc., CC Dockets Nos. 99-68 and 01-92, dated Sept. 10, 2008; Notice of *Ex Parte* Communication by EarthLink, Inc., CC Dockets Nos. 99-68 and 01-92, dated Oct. 17, 2008; *Ex Parte* Presentation of EarthLink, Inc., *et al.*, CC Dockets Nos. 99-68 and 01-92, dated Oct. 20, 2008 ("EarthLink October 20 *Ex Parte*"); Notice of *Ex Parte* Communication by EarthLink, Inc., CC Dockets Nos. 99-68 and 01-92, dated Oct. 23, 2008.



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judicial scrutiny. The Commission's order on November 4 should eliminate the distinction and subject ISP-bound traffic to the same FCC and state reciprocal compensation policies that govern voice traffic.

As a provider of dial-up ISP services, EarthLink relies on managed modem vendors to provide local dial up access to our customers. The lower, discriminatory rate that has been applied to ISP-bound traffic since 2001 adversely impacts the ability of EarthLink or other dial up ISPs to provide widespread, affordable Internet access to millions of Americans, particularly those in rural locations outside the reach of broadband. The current rate assigned to ISP-bound traffic, which can be as much as 75% lower than other local telecommunications rates, is accelerating the exit of managed modem vendors from rural exchanges. Several of EarthLink's managed modems vendors have exited the market already and others have notified EarthLink that they will soon eliminate service in hundreds of rural exchanges due, in part, to the artificially depressed value assigned ISP-bound traffic. The continuation of these rules may result in more managed modem vendors exiting particular exchanges or the market entirely. When a managed modem vendor exits an exchange, customers may lose the benefits of locally-dialed access to a competitive ISP.

On the other hand, elimination of the discriminatory treatment of ISP-bound traffic and the application of the same intercarrier compensation rules applied to other telecommunications traffic will further several important Commission policies. First, incumbent LECs, which are net outpayers of reciprocal compensation for ISP-bound traffic, will have an increased incentive to widely deploy more affordable broadband services in order to capture these dial up customers, thus reducing their reciprocal compensation payments. Second, eliminating the discriminatory treatment will permit ISPs to maintain and increase Internet access options for rural and low income consumers that do not have access to, or cannot afford, broadband. Third, in some localities dial up Internet access is the only competitive alternative to DSL or Cable modem. The lack of this competitive alternative would result in further concentration in the Internet access market, which could adversely impact consumer pricing as well as nondiscriminatory access to Internet services or applications (i.e. Net Neutrality concerns).

Ending the discrimination is also consistent with changed circumstances in the market since 2001. When the Commission enacted rules that distinguished ISP-bound traffic and established the lower \$.0007 rate, dial up traffic and reciprocal compensation payments were increasing. The Commission itself acknowledged the reversal of this trend in its brief to the D.C. Circuit.² Moreover, the record now clearly demonstrates that

² *In re Core Communications, Inc.*, 531 F.3d 849, 858 (D.C. Cir. 2008) ("The FCC's brief suggests that Core's concerns have less urgency because '[i]ncreasingly, end users are not using dial-up connections to connect to the Internet, but, rather, cable modem, DSL, and other broadband platforms.' FCC Br. 17 (emphasis omitted).").



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the number of dial up customers has decreased significantly³ as has the usage associated with the remaining dial up customers.⁴ Concerns of “rate shock” are unfounded – dial up ISP-bound customers and usage in 2008 are a fraction of what they were in 2001.

Finally, ending the discrimination is consistent with the law. As the Court found, “[e]ven if the Commission ultimately decides to include ISP-bound traffic in a more comprehensive scheme, it still must have statutory authority to do so.”⁵ It is my understanding that the current draft order circulating among the Commissioners will regulate ISP-bound traffic as “telecommunications” under Section 251(b)(5) of the Act, but it will impose an unreasonable transition period and maintain the \$.0007 rate set by the FCC for 10 more years. As EarthLink has shown, the FCC does not have the authority to set the rate for Section 251(b)(5) traffic, even on an interim basis.⁶ The Court expressed its frustration with the FCC’s enforcement for seven years of the legally invalid “interim” rules the FCC said would last only three years.⁷ Extending the three-year interim rules to 17 years in all is more than a “transition period” and will not withstand the inevitable judicial review. Although it is not clear how the Commission could justify a transition under the statute, if the Commission concludes that some transition period is necessary to move from \$.0007 to the Section 251(b)(5) rate set by the states, EarthLink suggests a transition measured in months rather than years, such as

³ See “Home Broadband Adoption 2008,” Pew Internet & American Life Project, July 2008, at 2 (attached to EarthLink August 14 *Ex Parte*). In 2001, 40% of households used dial-up access to reach the Internet, whereas less than 10% had broadband access. In 2008, 60% of households have broadband access, and only 10% continue to rely upon dial-up Internet access.

⁴ Under confidentiality protections, EarthLink has submitted internal numbers that demonstrate the decreased usage of dial-up Internet access customers from 2003 through 2008. See also *Ex Parte* Presentation of Level 3 Communications, LLC, CC Dockets Nos. 99-68 and 01-92, dated Aug. 18, 2008, at 3-5 (providing evidence relating to a decline in dial-up Internet traffic between 2005 and 2007 and estimates relating to a further decline); *Ex Parte* Presentation of Embarq, dated May 2, 2008, at Att. p. 3 (providing evidence relating to a decline in dial-up Internet traffic between 2006 and 2007); *Ex Parte* Presentation of Qwest, CC Dockets Nos. 96-98 and 99-68, dated April 25, 2008, at Att. p. 6 (providing evidence relating to a decline in dial-up Internet traffic between 2005 and 2007).

⁵ *Core*, 531 F.3d at 859.

⁶ EarthLink August 14 *Ex Parte* at 4, 10-12; EarthLink October 20 *Ex Parte* at 4-13.

⁷ *Core*, 531 F.3d at 857. (“It is now seven years since the FCC put in place the interim rules that it said would last only three. It is now six years since we held, for the second time, that the FCC’s legal justification for the rules was invalid and remanded for the agency to provide a valid justification. During all this time, the FCC has proceeded -- as it did in *PEPCO* and *Radio-Television* -- to enforce rules for which it has articulated no lawful basis.”).



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the 270 day transition enacted in the Wireline Broadband Order for Universal Service Fund payments.

I appreciate your consideration of EarthLink's concerns. If you have any questions or comments concerning EarthLink or its position in the matter, please do not hesitate to contact me. Thank you.

Sincerely,

Rolla P. Huff
Chairman and Chief Executive Officer
EarthLink Inc.

cc: Amy Bender
Scott Deutchman
Scott Bergmann
Greg Orlando
Nicholas Alexander