

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	

**REPLY COMMENTS OF EARTHLINK, INC.**

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EarthLink, Inc., by its attorneys and pursuant to the FCC’s Notice of Proposed Rulemaking,<sup>1</sup> files these Reply Comments on proposed rules to preserve the open Internet. As explained herein, the FCC should exercise its clear statutory authority over providers of facilities-based last-mile broadband access services and adopt the proposed rules to promote consumer choice, service innovation and broadband usage.

**I. INTRODUCTION AND SUMMARY**

EarthLink is one of the nation’s largest independent<sup>2</sup> Internet Service Providers (“ISPs”), with approximately 750,000 broadband and 900,000 dial-up Internet access subscribers. Since the dawn of retail broadband in 1998, EarthLink has actively pursued the rollout of broadband Internet access services to Americans throughout the country, building value-added consumer offerings that utilize wholesale broadband transmission inputs. Today, EarthLink delivers

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<sup>1</sup> *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd. 13064 (2009) (“NPRM”).

<sup>2</sup> An “independent” ISP is a provider of Internet access and related services that is not affiliated with a facilities-based provider of telephone, cable or satellite services.

broadband to American consumers, who enjoy EarthLink's nationally-recognized and award-winning broadband Internet access services.<sup>3</sup>

EarthLink has the experience and history promoting broadband innovation and choice for consumers that few, if any, companies can rival. EarthLink's consistent view and operational experience has been that consumer demand for broadband increases when more consumers are able to extract greater value out of available broadband applications, content and functionalities.<sup>4</sup> Just as independent ISPs introduced consumers to the possibilities of the Internet, including e-mail, instant messaging, personalized websites, customer-driven content and other features,<sup>5</sup> they have a key role in bringing consumers broadband-based Internet services, helping to drive broadband deployment, penetration, and competition in furtherance of the FCC's *National Broadband Plan* goals.<sup>6</sup>

For years, EarthLink has been at the forefront of the effort to ensure that consumers have the opportunity to experience innovative, affordable and competitive ISP services. As a premier

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<sup>3</sup> Among EarthLink's awards are: *Highest in Customer Satisfaction Among Dial-Up Internet Service Providers*, J.D. Power and Associates, in 2007 and 2008; *Top Three in Customer Satisfaction Among DSL Providers, East and West Regions*, J.D. Power and Associates, 2008; *Highest in Customer Satisfaction Among Residential Internet Service Providers, West Region*, J.D. Power and Associates, 2009; *Top Three in Customer Satisfaction Among Residential Internet Service Providers (tied with Verizon), South Region*, J.D. Power and Associates, 2009.

<sup>4</sup> As the Commission has found, broadband transmission for independent ISPs enables "affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services." *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 3 (1999).

<sup>5</sup> In addition to offering a range of user-friendly features (security, spam and privacy tools, targeted information, hosting, toolbars, etc.), independent ISPs can assist users in the sometimes challenging process of upgrading to broadband. See, e.g., Shane Greenstein, *Commercialization of the Internet: The Interaction of Public Policy and Private Choices*, National Bureau of Economic Research (Apr. 11, 2000), available at <http://www.nber.org/chapters/c10779.pdf>; Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 (July 1999).

<sup>6</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan* at pp. 9-11, GN Dkt. 09-51 (rel. Mar. 16, 2010) ("*National Broadband Plan*") (goals include ensuring all Americans have affordable access to robust broadband).

national broadband ISP, EarthLink participated fully in the numerous proceedings that have affected the ability of consumers to have a choice of competitive information service providers, including the FCC's proceedings that led to the *Cable Modem Order* and the *Wireline Broadband Order*.<sup>7</sup>

This NPRM tackles the next evolution of vital legal and policy determinations that will affect consumers' ability to utilize broadband services fully and to choose among a rich diversity of broadband services. Whether consumers can choose ISPs and Internet applications depends fundamentally on their ability to connect to and communicate with a full range of Internet services and applications via the services of the facilities-based last-mile broadband transmission service provider (hereinafter, "Broadband Provider"). Consumers should also be free to select among broadband services and not be limited in their broadband access choices by the practice of tying services, such as by making the purchase of telephone service a prerequisite to ordering broadband, or by Broadband Providers setting the price of standalone broadband in a way that effectively constricts consumer choice. Importantly, for an independent ISP to offer broadband service that is a true alternative to the service offered by the Broadband Providers, wholesale inputs must be priced in a way that offers customers competitively priced choices. Otherwise, the benefits and success of wholesale broadband service will be thwarted.

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<sup>7</sup> See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) ("*Cable Modem Order*"), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*"); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) ("*Wireline Broadband Order*"), *aff'd*, *Time Warner Telecom, Inc. v. Fed. Comm'n Comm.*, 507 F.3d 205 (3d Cir. 2007) ("*Time Warner Telecom*"). EarthLink participated fully in these proceedings at the FCC, *see, e.g.*, Comment of EarthLink, CC Dkt. 02-33 (filed May 3, 2002); Reply Comments of EarthLink, CC Dkt. 02-33 (filed Jul. 1, 2002); Comments of EarthLink, CS Dkt. 02-52 (filed Jun. 17, 2002); Reply Comments of EarthLink, CS Dkt. 02-52 (filed Aug. 6, 2002) and at the appellate level, *see* Brief of Respondents, EarthLink, Brand X Internet Services, and Center for Digital Democracy, *Brand X*, No. 04-277 (Feb. 22, 2005); Opening Brief, EarthLink, *Time Warner Telecom*, No. 05-4769 (Apr. 14, 2006); Reply Brief, EarthLink, *Time Warner Telecom*, No. 05-4769 (Jun. 30, 2006).

When consumers can choose easily among services and providers, ISPs and other Internet service entrepreneurs have strong incentives to innovate, stimulating consumer broadband demand and investment. Moreover, additional competitive alternatives increase the incentives of all broadband providers to offer better services and support to their customers in order to win and retain customers. The FCC's proposed open broadband rules will determine whether the Broadband Providers can interfere with (or block completely) the ability of independent providers of Internet access, information and application services to deliver a host of competing broadband applications and provide the level of customer support that consumers demand.<sup>8</sup>

It is now apparent that the judgments that were the cornerstones of the Commission's predictive approach to services of emerging last-mile Broadband Providers – a hope for “third pipe” competition and promises of increased and improved wholesale broadband access services – have been proven incorrect. At the same time, the promise and potential to leverage broadband networks to improve every sector of our national economy and social fabric is enormous. Accordingly, EarthLink urges the Commission to assert its statutory authority over the transmission services of Broadband Providers and revitalize its regulatory framework for the provision of wholesale broadband access inputs to non-facilities-based, independent ISPs. Exercising appropriate statutory authority does not necessarily mean heavy-handed or monopoly-style regulation. Indeed, the FCC could even continue its approach of permitting contractual broadband transmission arrangements between Broadband Providers and independent ISPs, with the statutory and enforcement “backstop” that is needed but sorely lacking today.

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<sup>8</sup> EarthLink agrees that the rules should apply to all components of a last-mile Broadband Provider's network, not just the last-mile, because access to other points on the network infrastructure also under that provider's control is necessary to provision wholesale service. *See, e.g.*, Comments of Google, Inc. (“Google”) at 60-61, GN Dkt. 09-191 (filed Jan. 14, 2010); NPRM at ¶ 107.

## **II. EARTHLINK SUPPORTS THE ADOPTION OF THE OPEN INTERNET RULES**

### **A. The Proposed Rules Will Help Achieve National Broadband Goals**

EarthLink applauds the FCC's recognition that the offering of wholesale broadband service is essential to the growth of broadband deployment throughout the nation.<sup>9</sup> As described in the Commission's *National Broadband Plan*, ensuring "robust competition" for American households and businesses "requires particular attention to the role of wholesale markets."<sup>10</sup> To meet the top goal of the *National Broadband Plan* – 100 million U.S. homes by 2020 with download speeds of 100 Mbps and upload speeds of 50 Mbps – the FCC made recommendations that will "foster competition, drive demand for increased network performance and lower the cost of deploying infrastructure."<sup>11</sup> Chief among these recommendations is the review and implementation of policies that promote wholesale broadband access competition.<sup>12</sup>

The proposed open broadband rules are an important complement to meeting these national goals. The Commission has consistently recognized the power of last-mile "gatekeepers" to impede competition and, in response, has properly implemented regulatory

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<sup>9</sup> See *National Broadband Plan* at p. 47 ("Ensuring robust competition not only for American households but also for American businesses requires particular attention to the role of wholesale markets, through which providers of broadband services secure critical inputs from one another.").

<sup>10</sup> *Id.* See also Comments of the Federal Trade Commission at 3, GN Dkt. 09-51 (filed Sept. 4, 2009) ("Competitive firms are constantly searching for superior profit opportunities as they seek to win the favor of customers, who effectively vote for preferred products and services with their dollars.").

<sup>11</sup> *National Broadband Plan* at p. 9.

<sup>12</sup> See *National Broadband Plan* at pp. 9, 47-48. It is also clear from EarthLink's own experience that the offering of competitive broadband access services adds significantly to consumer satisfaction and broadband adoption. Features specific to EarthLink's broadband service offerings, such as award-winning customer and technical support, email and online protection are important to consumers and lead customers to choose a competitive alternative to the incumbent provider where they might not otherwise take up broadband service at all. See, e.g., Letter from Jennifer P. Bagg, Counsel, EarthLink, Inc. and New Edge Network, Inc., to Marlene Dortch, Secretary, FCC, at 2, GN Dkt. 09-51 (filed Sept. 14, 2009).

policies to ensure open communications networks.<sup>13</sup> As the initial comments and FCC data underscore, consumers throughout the U.S. have limited options for broadband access services, and while Broadband Providers may sell services such as voice and video that compete with the content and applications offered by others over the Internet, the economic interests of Broadband Providers do not always align with the public's interests.<sup>14</sup>

Notably, Congress last year established broadband deployment and usage as a top national priority in the Recovery Act.<sup>15</sup> In awarding grants for broadband projects, receipt of funding is conditioned upon adherence to the principles of the FCC's *Internet Policy Statement*,

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<sup>13</sup> See, e.g., NPRM at ¶ 26. See also *Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order*, 104 F.C.C. 2d 958, ¶ 4 (1986) ("*Computer III*") (subsequent history omitted) (eliminating structural separation in favor of nonstructural safeguards, noting that under the new nonstructural regime, the BOCs and AT&T "may not discriminate in favor of their own enhanced services operations in providing CEI and must file periodic reports to substantiate that nondiscrimination."); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 1988 Biennial Regulatory Review, Report and Order*, 16 FCC Rcd. 7418, ¶ 46 (2001) ("*CPE/Enhanced Services Unbundling Rules*") (emphasizing that "section 202 applies equally to all carriers, both dominant and nondominant, that provide transmission service to competitive enhanced service providers. . . all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive [I]nternet or other enhanced service providers. Indeed, the Commission has already found that where there is an incentive for a carrier to discriminate unreasonably in its provision of basic transmission services used by competitors to provide enhanced services, section 202 acts as a bar to such discrimination. In addition, we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act."). See also Comments of Center for Democracy and Technology at 19 (noting that in *Computer II, Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision*, 77 F.C.C. 2d 384 (1980) ("*Computer II*"), the Commission "was concerned that certain telephone companies could leverage their dominance in the market for last mile transmission services to preclude robust competition in the adjacent market for enhanced services.").

<sup>14</sup> See Comments of Google at 28-29; National Exchange Carriers Association, Inc. at 8-9; XO Communication, LLC ("*XO*") at 2-3. See also NPRM at ¶ 7; *National Broadband Plan* at p. 37.

<sup>15</sup> See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 § 6001(k)(2)(D) (2009) ("*Recovery Act*") ("use of broadband infrastructure and services" is to "advanc[e] consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes").

as well as policies of nondiscrimination and interconnection.<sup>16</sup> This requirement recognizes that diverse providers, including independent ISPs, are well-positioned to bring value-added broadband services to consumers and provide additional market choices, which serve to increase usage and drive innovation and investment.

EarthLink agrees that to increase broadband deployment and adoption, the FCC's regulatory framework should promote broadband access competition and competitive Internet access services, which can spur investment and job creation, and will further the goals of "preserving and promoting the open Internet."<sup>17</sup> Moreover, policies that guarantee consumer choice among competing information service providers, including independent ISPs, encourage legacy network providers to continue to innovate and invest, as they follow the lead of the competitive providers who often experiment with a variety of cutting-edge services.<sup>18</sup> Conversely, without rules, innovation and broadband deployment will suffer, and the larger beneficial societal and spillover effects will be dampened.<sup>19</sup>

Further, as the FCC implements the *National Broadband Plan* goals, it should recognize that wholesale broadband access services are essential to ensure that consumers enjoy competitive alternatives in locations where building out additional infrastructure is economically

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<sup>16</sup> See Recovery Act, § 6001(j) ("non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded under this section, including, at a minimum, adherence to the principles contained in the Commission's [Internet Policy Statement]").

<sup>17</sup> NPRM at ¶¶ 10, 51-55.

<sup>18</sup> See *National Broadband Plan* at p. 38 (describing how competition has "induced broadband providers to invest in network upgrades," and, as a result, consumers are benefiting from the new choices and higher speeds). See also Comments of Covad Communications Company at 2; Google at 12; PAETEC Holding Corp. ("PAETEC") at 23-24; XO at 3.

<sup>19</sup> See, e.g., NPRM at ¶ 67; Comments of Center for Democracy and Technology ("CDT") at 28; Google at 2; Open Internet Coalition at 21-22; XO at 6-7. See also, e.g., *National Broadband Plan* at p. 38 (stating that "broadband providers appear to invest more heavily in network upgrades in areas where they face competition").

infeasible.<sup>20</sup> Importantly, promoting choice in this way helps create fuller utilization of newly-deployed broadband networks, enabling better and swifter realization of network investments, and ensuring that previously un-served areas do not immediately transition into underserved areas (*i.e.*, single provider service areas).<sup>21</sup> Competition also increases the focus of all broadband providers on offering better, more customer-friendly support as providers compete in order to retain customers.

### **B. Consumers Should be Guaranteed Choice of Broadband Internet Access Providers**

Consistent with achieving the goals of the FCC's far-reaching *National Broadband Plan*, EarthLink urges codification of the proposed rules, and notes the particular importance of proposed rule 8.11 to ensure Broadband Providers do not deprive any user from access to competition among network, applications, service, and content providers, including independent broadband ISPs.<sup>22</sup>

As many commenters point out, the rules logically and appropriately should apply only to last-mile Broadband Providers.<sup>23</sup> The unique "bottleneck" position of these entities can be used to deprive users of access to competitive services and to skew market successes and failures for reasons unrelated to consumer choice and truly competitive market signals.<sup>24</sup> As the FCC and

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<sup>20</sup> *National Broadband Plan* at p. 48.

<sup>21</sup> As a result of the nondiscrimination and interconnection policies imposed on recipients of Recovery Act funding, EarthLink hopes to work closely with Recovery Act fund recipients to provide competition on newly-built infrastructure. *See also* Letter from Jennifer P. Bagg, Counsel, EarthLink, Inc. and New Edge Network, Inc., to Marlene Dortch, Secretary, FCC, at 2, GN Dkt. 09-51 (filed Nov. 30, 2009) (describing EarthLink's meeting with a Recovery Act fund applicant seeking to build a broadband network).

<sup>22</sup> *See, e.g.*, Comments of PAETEC at 7; XO at 9.

<sup>23</sup> *See, e.g.*, Comments of Google at 84; Open Internet Coalition at 82; Public Knowledge, *et al* ("Public Knowledge") at 3.

<sup>24</sup> *See, e.g.*, Comments of Global Crossing North America at 5-8; Open Internet Coalition at 73-75.

the record makes clear, all users must first access the broadband network before being able to utilize the other offerings available over the network.<sup>25</sup>

Further, not only are the Broadband Providers uniquely positioned to limit or interfere with access to competitive services and applications, they have strong incentives to limit users' access to other competing service providers.<sup>26</sup> To prevent discriminatory and anticompetitive conduct, the Commission should ensure that all users, including competitive service and applications providers, are able to access last-mile transmission networks on nondiscriminatory and reasonable terms, conditions and pricing. Moreover, the Commission should ensure that consumers are not limited in their choice of broadband provider through discriminatory practices of the last-mile Broadband Provider, such as limiting the supply of wholesale broadband access to end users with landline telephone service or charging disproportionately higher wholesale prices for standalone broadband services.

FCC action limited to the source of concern – the gateway network control of the Broadband Providers over access between users and the plethora of Internet services and features – would be well-tailored. Independent broadband ISPs, like other providers of broadband-based information services, cannot exercise control over the transmission networks of the Broadband Providers. As many parties highlight, the concerns regarding discriminatory conduct are not applicable to entities that do not control the broadband transmission network and, practically speaking, do not have the ability to limit consumer choice.<sup>27</sup>

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<sup>25</sup> See, e.g., NPRM at ¶73; Comments of Google at 15; Open Internet Coalition at 75.

<sup>26</sup> See, e.g., NPRM at ¶ 73; Comments of CDT at 6; Public Knowledge at 23-24; Skype Communications S.A.R.L. at 10-12. Moreover, broadband providers often bundle core services, such as telephone services, with broadband services and have strong incentives to exclude competitors.

<sup>27</sup> See, e.g., Comments of Netflix, Inc. at 5-7; National Association of State Utility Consumer Advocates at 14-15; National Association of Trade Officers and Advisors at 10; Open Internet Coalition at 15-17; Sony Electronics at 4-5.

Open networks between consumers and Internet entrepreneurs increase innovation and enable independent ISPs and other information and applications providers to use their creativity and competing business plans to stimulate consumer broadband adoption and demand.<sup>28</sup> Policies that promote competitive broadband ISPs will generate a virtuous cycle of competition and additional investment by both retail and wholesale providers. There is ample evidence that other countries that have implemented wholesale access obligations have significantly increased the availability and speed of consumer broadband.<sup>29</sup> Conversely, in the absence of such policies, “the price of entry is too high and competition falters; over time, innovation lags, and the goal of broader and better access suffers.”<sup>30</sup>

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<sup>28</sup> See, e.g., Comments of Ad Hoc Telecommunications Users Committee (“Ad Hoc Users”) at 15-16 (“If wireline and wireless access providers are permitted to exploit their monopoly control of end user subscribers to the detriment of downstream content, application and service providers, demand for such services will be suppressed, their potential profitability will be diminished, and investment in those sectors will necessarily be less forthcoming.”). See also Comments of Public Knowledge at 64.

<sup>29</sup> See, e.g., Harvard University Berkman Center for Internet & Society, *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World*, 13- 14, (Feb. 15, 2010) (“*Berkman Center Final Report*”), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman\\_Center\\_Broadband\\_Final\\_Report\\_15Feb2010.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf) (“‘open access’ policies – unbundling, bitstream access, collocation requirements, wholesaling, and/or functional separation – are almost universally understood as having played a core role in the first generation transition to broadband in most of the high performing countries; that they now play a core role in planning for the next generation transition; and that the positive impact of such policies is strongly supported by the evidence of the first generation broadband transition. . . . Open access rules are intended to encourage entry by those competitors, who can then focus their own investments and innovation on electronics and services that use that basic infrastructure.”). *Id.* at 110 (“‘a ‘mix’ of infrastructure and [wholesale] competition, like the one promoted in the Netherlands, stimulates investment by both incumbents and entrants and offers better consumer benefits.’”) (internal citation omitted).

<sup>30</sup> See Yochai Benkler, *Ending the Internet’s Trench Warfare*, NY Times, (Mar. 21, 2010), available at <http://www.nytimes.com/2010/03/21/opinion/21Benkler.html?ref=opinion>. See also Richard Martin, *FCC Punts on National Broadband Plan*, VON Blog, Mar. 24, 2010, available at <http://www.von.com/blogs/martin/blogdefault.aspx?m=art&a=fcc-punts-on-national-broadband.html> (noting that the FCC’s “well-intentioned recommendations. . . will accomplish little as long as nothing is done about fostering true competition over existing, costly high-speed fiber access cable.”); *Plans for Broadband, Pipe Dream*, The Economist (Mar. 18, 2010), available at [http://www.economist.com/world/united-states/displaystory.cfm?story\\_id=15732610](http://www.economist.com/world/united-states/displaystory.cfm?story_id=15732610) (“Almost uniquely among OECD countries, America has adopted no policies to require the owners of broadband cables to open their infrastructure to rival sellers in order to enhance competition. . . . If America’s facilities-based

### **III. THE FCC SHOULD EXERCISE ITS CLEAR AUTHORITY OVER THE TRANSMISSION SERVICES OF BROADBAND PROVIDERS**

#### **A. Current Practices of Broadband Providers Demand Government Oversight**

In the years since the FCC adopted its current “minimal” regime, the failure of adequate government oversight has served to exacerbate the lack of competition for broadband facilities and transmission services. Rather than “benefit American consumers and promote innovative and efficient communications,”<sup>31</sup> the result has been to entrench even more the last-mile broadband duopoly and further quash consumer choice and innovation. Despite the Commissioners’ high hopes,<sup>32</sup> consumers have been denied options and access to independent broadband ISPs (which ironically still exist in the dial-up world) because of control over the on-ramps and off-ramps of the Internet by the Broadband Providers. Simply put, though the FCC clearly wished that these entities would not be able “to exert considerable market power over unaffiliated entities in the provision of information services,”<sup>33</sup> this market power not only endures, its negative impacts are inescapable.

While there have been some notable exceptions, such as the mutually-beneficial broadband arrangement EarthLink has with Time Warner Cable,<sup>34</sup> for the most part, EarthLink, like other independent ISPs, has been unable to expand its Internet access services to consumers

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system were really working, the country would at the very least enjoy first-rate broadband in dense urban areas where providers are most likely to recoup their investments quickly.”).

<sup>31</sup> *Wireline Broadband Order* at ¶ 1.

<sup>32</sup> *See, e.g., id.* at Statement of Chairman Kevin Martin (“I believe that, with the actions we take today, consumers will reap the benefits of increased Internet access competition and enjoy innovative high-speed services at lower prices.”).

<sup>33</sup> *Id.*

<sup>34</sup> While EarthLink’s original agreement with Time Warner arose from conditions imposed by the Federal Trade Commission on the America Online Inc. and Time Warner Inc. merger, *see* Federal Trade Commission, Decision and Order, Dkt No. C- 3989, File No. 001 0105 (Dec. 14, 2000), as a result of the mutually-beneficial results of that arrangement, the agreement was renewed after the expiration of the merger conditions.

via cable broadband, ranging from the largest cable broadband provider to smaller regional providers. Similarly, although EarthLink continues to engage in business development efforts to seek new and better wholesale arrangements for broadband transmission inputs from telephone companies (including from companies that offer services in less populated areas and territories outside of the service areas of the former Bell Operating Companies), new and improved broadband access arrangements have not been forthcoming. This inability to obtain needed broadband inputs translates into lost opportunities for consumers, diminished network utilization and ultimately, less broadband adoption, usage and demand. The once-vibrant independent ISP industry, recognized by the FCC as helping to bring Americans online throughout the country,<sup>35</sup> is now much smaller and in decline.

Significantly, even where the Broadband Providers have agreed (often under the auspices of merger conditions) to continue broadband access arrangements with independent ISPs, they have continued to flex their substantial market power over broadband access services to charge wholesale prices at or near consumer retail rates, as well as to demand substantial volume thresholds, impose significant shortfall penalties and mandate rates, terms, and conditions that make it uneconomic for competitive Internet access service providers to compete fairly.<sup>36</sup> Just as

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<sup>35</sup> See, e.g., *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, ¶65 (1998) (“Internet usage has grown steadily and rapidly, especially since the development of the World Wide Web in 1989. According to one survey, there are currently more than 4,000 Internet service providers and 40 national Internet backbones operating in the United States. According to data presented at our en banc hearing on February 19, 1998, Internet service provider market revenues are projected to grow from under four billion dollars in 1996 to eighteen billion dollars in the year 2000.”).

<sup>36</sup> The FCC has long held that it will investigate anticompetitive pricing, including price squeezes and predatory pricing, and that such practices are inconsistent with the Communications Act and contrary to the public interest. See, e.g., *Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, Order*, 11 FCC Rcd. 14028, ¶ 20, n.44 (1996) (“a price squeeze can occur when an entity that provides both a retail product and a necessary input for providing that retail product possesses market power over the input. A price squeeze exists when the price of the input product is so high, relative to the price of the retail product, that competing providers of retail service are unable to make a profit.”); *GTE Telephone Operating Cos.*;

the FCC explained in the *National Broadband Plan*, “[w]holesale prices that are too high may deter efficient competitive entry...” thus thwarting the benefits and success of wholesale inputs for broadband services.<sup>37</sup>

Similarly, telephone company-affiliated Broadband Providers often engage in discriminatory practices such as limiting the provisioning of wholesale broadband access to consumers who purchase the landline telephone service of the telephone company. This practice significantly frustrates consumers’ access to affordable broadband alternatives, as well as impedes the goal of promoting broadband adoption. Indeed, consumers who have terminated landline phone service are often immediately denied access to broadband. Alternatively, where companies, such as Verizon, sell standalone wholesale broadband access at reasonable prices, independent ISPs like EarthLink can offer consumers only the products they want, freeing consumers to choose among the variety of telephone options available today, including mobile and VoIP offerings, further promoting competition.<sup>38</sup>

As a practical matter, these practices, including the refusal by some Broadband Providers even to consider allowing competitive broadband Internet access providers to serve consumers, have allowed Broadband Providers to squeeze out competition for broadband Internet access and other information services by leveraging their gateway control over broadband access. Ultimately, this redounds to the detriment of consumers throughout the nation who have suffered

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*GTOC Tariff No. 1, Memorandum Opinion and Order*, 13 FCC Rcd. 22466, ¶ 32 (1998) (“We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable. . . . We conclude, therefore, that federal tariffing of interstate DSL services, such as the one at issue here, is appropriate, and we will address any price squeeze concerns as they arise”).

<sup>37</sup> *National Broadband Plan* at p. 65, fn. 78.

<sup>38</sup> At the launch of EarthLink’s standalone DSL arrangement with Verizon three years ago, 15% of EarthLink customers in Verizon territories purchased standalone DSL. That number has grown to 52% signifying that, given the option, a significant number of consumers are interested only in the broadband access service. Notably, EarthLink repeatedly has asked AT&T to provide a reasonably priced wholesale stand-alone DSL service, but AT&T has failed to make such a service available to EarthLink.

higher prices and lower broadband speeds, especially as compared with other nations that have pursued pro-competitive policies.<sup>39</sup>

## **B. The FCC Has Title II Statutory Authority to Adopt the Proposed Rules**

The FCC should act decisively as it considers this NPRM and exercise its ample authority under the Communications Act to oversee the practices of Broadband Providers. As the comments filed to date and the factual evidence make clear, many of the predictive judgments central to the *Cable Modem Order* and *Wireline Broadband Order* (and, by extension, the decisions regarding broadband over power lines (“BPL”) and wireless broadband services)<sup>40</sup> have not come to pass. As such, it is time now for the FCC to revisit these erroneous determinations and exercise Title II jurisdiction over the transmission services of the Broadband Providers.

First, though the FCC observed in 2005 that it was “too early” to reach conclusions about the state of broadband competition,<sup>41</sup> it is now clear that “approximately 96% of the population has at most two wireline providers,” underscoring that “there are reasons to be concerned about wireline broadband competition in the United States.”<sup>42</sup> This is consistent with the findings of the Department of Justice and the NTIA as well as the FCC’s own high-speed data reports.<sup>43</sup>

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<sup>39</sup> See *Statement of Commissioner Mignon Clyburn Regarding Broadband Affordability and Competition*, FCC News Release (Mar. 10, 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296790A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296790A1.pdf); *Berkman Center Final Report* at 13-14.

<sup>40</sup> See *Wireline Broadband Order* at ¶¶ 50, 56-61; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 27 (2006); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd. 13281, ¶ 10 (2006).

<sup>41</sup> See *Wireline Broadband Order* at ¶ 50.

<sup>42</sup> *National Broadband Plan* at p. 37.

<sup>43</sup> See *Ex Parte* Submission of the United States Department of Justice at 13-14, GN Dkt. 09-51 (filed Jan. 4, 2010); Letter from Lawrence Strickling, Assistant Secretary for Communications and Information,

Moreover, no “third pipe” entrant (including the elusive BPL competitor) has emerged and none is likely to, with over ten years of data showing market failure.<sup>44</sup> The “larger trends” for broadband that the Commission relied so heavily upon previously<sup>45</sup> confirm what EarthLink and other independent ISPs have experienced firsthand – there is a persistent lack of broadband access competition in the last-mile resulting in serious and detrimental ramifications in the marketplace for consumers.<sup>46</sup>

Neither have the FCC’s predictions about a vibrant wholesale market come to pass. The FCC stated in 2005 that “we expect that facilities-based wireline carriers will have business reasons to continue making broadband Internet access transmission services available to ISPs” and that “carriers have a business interest in maximizing the traffic on their networks,” such that wholesale arrangements would continue to evolve from both cable and telephone broadband providers.<sup>47</sup> Indeed, while the FCC posited that the previous framework that promoted competitive access was somehow constricting the creativity of the Broadband Providers to enter

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Department of Commerce, National Telecommunications and Information Administration, to Julius Genachowski, Chairman, FCC, at 3, GN Dkt. 09-51 (filed Jan. 4, 2010) (asking the Commission to examine anticompetitive behavior where “in many areas of the country is at best a duopoly market. . .”). See also FCC Report, *High-Speed Services for Internet Access: Status as of December 31, 2008*, Chart 9 (rel. Feb. 2010) (demonstrating that satellite and BPL combined account for less than 1/10 of one percent of all advanced services lines in the nation).

<sup>44</sup> Neither are satellite or fixed or mobile wireless competitive alternatives. As some commenters and the *National Broadband Plan* have pointed out, these broadband services are not substitutes for wireline broadband access. See *National Broadband Plan* at p. 41 (“Wireless broadband may not be an effective substitute in the foreseeable future for consumers seeking high-speed connections at prices competitive with wireline offers.”). See also Comments of Ad Hoc Users at 9; Association for Competitive Technology at 22; Google at 21; Vonage Holdings Corp. at 8.

<sup>45</sup> *Wireline Broadband Order* at ¶ 50.

<sup>46</sup> See *National Broadband Plan* at p. 42 (larger trends now suggest that “in areas that include 75% of the population, consumers will likely have only one service provider (cable companies with DOCSIS 3.0-enabled infrastructure) that can offer very high peak download speeds.”).

<sup>47</sup> *Wireline Broadband Order* at ¶¶ 62-63.

into beneficial wholesale arrangements,<sup>48</sup> the facts have proved to be precisely as EarthLink predicted they would be: there have been no new “creative arrangements,” but instead a general pattern of anticompetitive practices designed to limit choice.<sup>49</sup>

Notably, another factual basis for the FCC’s previous classification decisions has also been shown to be unfounded. Internet access information service functionality is not “inextricably intertwined” with the transmission component offered by facilities-based last mile broadband access providers, as underscored by the many carriers that continue to offer separate transmission and information services.<sup>50</sup> Today’s Broadband Providers also overwhelmingly compete (where they compete) on price and speed – the hallmarks of transmission services – and consumers have grown accustomed to looking to information service providers (including ISPs) for their information service functionality including email, spam and security protections, applications and DNS lookup, as well as their superior customer support.<sup>51</sup> Of course, the FCC long operated under a framework that recognized the clear distinctions between underlying transmission access connectivity on the one hand and enhancements on the other.<sup>52</sup> Notably, the

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<sup>48</sup> *Id.* at ¶ 63.

<sup>49</sup> *See, e.g.*, Letter from Mark J. O’Connor, Counsel, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, 1-2, CC Dkt. No. 02-33 (filed Aug. 6, 2003); Letter from Mark J. O’Connor, Counsel, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, 2, CC Dkt. No. 02-33 (filed Aug. 18, 2003); Letter from Donna N. Lampert, Counsel, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, 2, CC Dkt. No. 02-33 (filed Aug. 3, 2005).

<sup>50</sup> *See Brand X* at 1008 (Scalia, A., dissenting) (finding that the physical transmission component was a service distinct from the enhanced service). *See also* NECA FCC Tariff No. 5 states that Digital Subscriber Line Access services are provided: “Where offered under this tariff, *Digital Subscriber Line Access Services provide transmission services* over local exchange service facilities that can be used for simultaneous voice and data communications. Service is provided, where available, between customer designated premises and designated Telephone Company Serving Wire Centers.” NECA FCC Tariff. No. 5, p. 8-1 (effective Feb. 17, 2007) (emphasis added).

<sup>51</sup> *See Brand X* at 975; Reply Comments of Public Knowledge – *National Broadband Plan* Public Notice # 30 at 8-9, GN Dkt. No. 09-51 (filed Jan. 26, 2010).

<sup>52</sup> *Computer II* at ¶¶ 121-29, 168-72; *CPE/Enhanced Services Unbundling Order* at ¶ 46.

FCC's so-called "contamination doctrine" whereby the inclusion of an enhanced (information) service with a basic transmission telecommunications service resulted in the entire bundle being treated as an enhanced service did not apply to facilities-based carriers such as the Broadband Providers at issue here.<sup>53</sup> Given the risk of anticompetitive conduct by these entities due to their control of the underlying facilities, the FCC properly understood that the Internet access offerings of facilities-based carriers included a basic telecommunications service and a separate enhanced (information) service.<sup>54</sup> The facts make it clear that this distinction is still workable today.

In light of the evidence regarding today's broadband access marketplace, the FCC should exercise its clear authority over the Broadband Providers. The Commission's Title II authority is well-established and will afford all parties substantial legal and business certainty. Moreover, the contention surrounding the FCC's ancillary jurisdiction means it is now most effective for the FCC to proceed under the certainty of Title II.<sup>55</sup> Specifically, the FCC should conclude that the transmission services of Broadband Providers fall squarely within the FCC's Title II jurisdiction

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<sup>53</sup> See, e.g., *Independent Data Communications Manufacturers Association, Inc., Memorandum Opinion and Order*, 10 FCC Rcd. 13717, ¶¶ 42, 44-45 (1995) (declining to extend the "contamination theory" to the frame relay services of facilities-based providers).

<sup>54</sup> *CPE/Enhanced Services Unbundling Order* at ¶ 12. ("[W]e are not eliminating at this time the fundamental provisions contained in our *Computer II* and *Computer III* proceedings that facilities-based carriers continue to offer the underlying transmission service on nondiscriminatory terms, and that competitive enhanced services providers should therefore continue to have access to this critical input.").

<sup>55</sup> See *Comcast v. FCC*, No. 08-1291 (D.C. Cir. Apr. 6, 2010) (order vacating Comcast BitTorrent Order). While the DC Circuit's opinion permits the Commission to rely on its Title I ancillary authority here or in future decisions so long as they are expressly grounded in "statutorily mandated responsibilities," that approach would likely saddle the communications landscape with more judicial review, risks, and delay. In any event, the FCC's Title II authority is sound and would only require a clear articulation of the reasons for departure from the *Wireline Broadband Order* and *Cable Modem Order* for the reasons described herein. See *Fed. Comm'n Comm v. Fox Television Stations, Inc. Fed. Comm'n Comm'n v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) ("The fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so.").

and that this classification best comports with the broadband marketplace the FCC confronts today.

The FCC can and should invoke its legal authority as set forth in substantial precedent that affords it the discretion to subject services and providers to common carriage obligations when there is a public interest to do so.<sup>56</sup> Where, as here, Broadband Providers have the ability to exercise market power, have engaged in market practices that undermine competition, and have strong incentives to continue to choke off broadband competition and access, this course will best establish a forward-looking, pro-consumer national broadband policy, consistent with the goals of the Communications Act.

Despite claims to the contrary,<sup>57</sup> classifying the transmission services of the Broadband Providers as basic telecommunications services under Title II of the Communications Act is consistent with decades of FCC precedent and enormous innovation, investment and expansion of information services and applications, including Internet access.<sup>58</sup> The Broadband Providers,

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<sup>56</sup> See *Nat'l Ass'n of Regulatory Utility Commc'ns v. Fed. Commc'ns Comm.*, 525 F.2d 630, 640-43 (D.C. Cir. 1976) *cert. denied*, *Nat'l Ass'n of Radiotelephone Sys. v. FCC*, 425 U.S. 992 (1976) (“*NARUC I*”); see also, *Nat'l Ass'n of Regulatory Utility Commc'ns v. FCC*, 533 F.2d 601, 609-610 (D.C. Cir. 1976). Under this precedent, the Commission may regulate an entity as a common carrier if “there is or should be any legal compulsion to serve the public indifferently.” *Hughes Communications, Inc., Order and Authorization*, 12 FCC Rcd. 7534, ¶ 17 (1997) (citing *NARUC I*).

<sup>57</sup> Comments of AT&T Inc. at 210; Comcast Corporation at 31-32; Independent Telephone and Telecommunications Alliance at 17; National Cable and Telecommunications Association at 13; Verizon and Verizon Wireless at 93-98.

<sup>58</sup> See *GTE Telephone Operating Cos., Memorandum Opinion and Order*, 13 FCC Rcd. 22466, (1998) (GTE introduced wholesale ADSL service in its federal tariff as an interstate access telecommunications service); *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24011, ¶¶ 35-37 (1998):

[ILECs] have proposed, and are currently offering, a variety of services in which they use xDSL technology and packet switching to provide members of the public with a transparent, unenhanced, transmission path. Neither the petitioners, nor any commenter, disagree with our conclusion that a carrier offering such a service is offering a ‘telecommunications service’. . . BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer

users, and independent information service providers (including ISPs) have a long history and ample experience with this framework, which would immediately ensure that the FCC has sufficient, but narrowly-tailored, regulatory oversight over these providers insofar as they control necessary last-mile broadband access. Reliance upon the FCC's Title II precedent, as well as the established Section 208 enforcement process, will serve as a much-needed legal and regulatory backstop to prevent Broadband Providers from blocking access to, discriminating against, or engaging in other anticompetitive practices against independent Internet access, applications and information service providers.

Importantly, this approach would not necessarily compel adoption of all legacy Title II requirements, including the detailed obligations articulated in the *Computer Inquiries*. Instead, the FCC can and should exercise appropriate regulatory forbearance under Section 10 of the Communications Act if particular Title II obligations are not necessary or appropriate.<sup>59</sup> Title II jurisdiction, for example, would not necessarily require mandatory tariffing of broadband services; rather, as an initial matter, the Commission might continue to rely upon contractual relationships for broadband transmission, subject only to the Commission's Title II oversight and enforcement authority as a backstop to address potentially unjust or unreasonable practices.

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competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services.

<sup>59</sup> See 47 U.S.C. § 160(c).

#### **IV. CONCLUSION**

For the foregoing reasons, EarthLink urges the FCC to exercise its statutory authority and adopt the proposed open broadband rules to guarantee consumer choice, promote innovation and enhance competition.

Respectfully submitted,



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