

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

In the Matter of)
)
Framework for Broadband Internet Service) GN Docket No. 10-127
)
)

COMMENTS OF EARTHLINK, INC.

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opportunity to experience innovative, affordable and competitive ISP services. As a leading national broadband ISP, EarthLink participated fully in the numerous proceedings, including the FCC's proceedings that led to the *Cable Modem Order* and the *Wireline Broadband Order*,³ seeking to assure consumers have a choice of competitive information service providers. Even as the regulatory classification of broadband services has changed, EarthLink has been committed to bringing consumers broadband choice and today delivers its nationally-recognized and award-winning broadband Internet services to American consumers.⁴

It is EarthLink's operational experience that consumer demand for broadband increases when more consumers can extract greater value out of available broadband applications, content and functionalities.⁵ 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,⁶ they have a key role in bringing consumers broadband-based Internet

³ 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. FCC*, 507 F.3d 205 (3d Cir. 2007).

⁴ 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.

⁵ Availability of broadband transmission inputs 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) ("*Advanced Services Second R&O*").

⁶ 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*

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services, helping to drive broadband deployment, penetration, and competition in furtherance of the FCC's *National Broadband Plan* goals.⁷

As EarthLink knows firsthand from today's marketplace, the legal, factual and policy predicates of the Commission's broadband deregulation in 2002 and 2005 have proven to be seriously flawed and have led to an enormous decline in the number of ISPs offering competitive services. In turn, EarthLink and other independent ISPs no longer spend hundreds of millions of investment dollars annually to bring consumers ISP choice. Today's broadband access monopoly/duopoly disservices consumers directly and has also led to wholesale service practices by Broadband Providers that have further hobbled independent ISPs from offering robust broadband Internet services, including denial of wholesale access, tying broadband with telephone services and cable television services, unreasonably high prices for wholesale access, and service limitations. This has also limited consumer choice, increased prices, diminished customer support, and forced consumers into purchasing multiple high-priced service offerings (*i.e.*, "bundles").

The broadband transmission services underlying Internet services are far too critical to our nation's economy and to Americans' daily lives for the Commission not to assert its existing statutory authority following the D.C. Circuit's decision in *Comcast*.⁸ EarthLink supports the Commission's Third Way approach to FCC authority over broadband Internet services, as

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), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

⁷ See 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).

⁸ See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (order vacating FCC's Comcast BitTorrent Order) ("*Comcast*").

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outlined in the NoI, and believes it represents a reasonable position between the current oversight gap and traditional dominant carrier regulation of Broadband Providers. The Commission has ample and well-settled authority to determine that Broadband Providers' transmission services should be treated as telecommunications services subject to Title II of the Communications Act, both as a matter of statutory interpretation and as a sound public interest policy approach. At the same time, the Third Way avoids excessive regulation. Instead, the Commission would preserve only those obligations that are important for consumers, competition and broadband goals.

EarthLink agrees with the NoI that the Commission should exercise its authority narrowly, limiting its oversight under the Communications Act to the source of concern – the broadband Internet connectivity services of Broadband Providers. As decades of FCC precedent recognized, non-facilities-based ISPs do not raise public interest concerns because they do not control the “last mile” access facilities, do not have the gateway ability to shape or degrade all inbound/outbound traffic, and generally have no other lines of business (*e.g.*, traditional telephone or cable television services) that provide the incentives to engage in anti-competitive conduct. Accordingly, the FCC should confirm its statutory interpretation that soundly held that non-facilities-based ISPs provide information services using telecommunications inputs but do not themselves offer the underlying broadband telecommunications services.

Finally, the Commission should affirm a clear policy that recognizes that independent ISPs serve a critical competitive role in the mission to enhance broadband deployment and usage. This finding is consistent with the *National Broadband Plan* and with the experience of most other nations that enjoy greater broadband choice, deployment and usage. The Commission should expressly encourage reasonable wholesale access arrangements between

Broadband Providers and independent ISPs to promote investment and give American consumers ISP choice.

DISCUSSION

I. MARKET REALITIES AND CURRENT PROVIDER PRACTICES DEMAND GOVERNMENT OVERSIGHT

A. The Facts of the Broadband Market Demonstrate Broadband Providers' Internet Connectivity Should Be Offered Under Title II

As the evidence makes clear, many of the predictive judgments central to the *Cable Modem Order* and the *Wireline Broadband Order*⁹ have not come to pass. Similarly, the factual underpinnings of these decisions no longer hold true in today's marketplace.

Predictions of a "Third Pipe" Have Not Materialized. Though the FCC observed in 2005 that it was too early to reach conclusions about the state of broadband competition,¹⁰ 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."¹¹ This is consistent with the findings of the Department of Justice and the National Telecommunications and Information Administration as well as the FCC's own high-speed data reports.¹² Clearly, no broadband "third pipe" entrant has emerged and none is likely

⁹ See *Wireline Broadband Order* at ¶¶ 50, 56-61.

¹⁰ *Id.* at ¶ 50.

¹¹ *National Broadband Plan* at p. 37.

¹² 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, Department of Commerce, National Telecommunications and Information Administration, to Julius Genachowski, Chairman, FCC, at 6, 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*, FCC Report, Chart 9 (rel. Feb. 2010) (demonstrating that satellite and broadband over powerline combined account for less than 1/10 of one percent of all advanced services lines in the nation).

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to, with over ten years of data showing market failure.¹³ The “larger trends” for broadband that the Commission relied so heavily upon previously¹⁴ 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 for consumers.¹⁵ As the Commission has explained, “[e]conomists, courts, and the Commission have long recognized that duopolies may present significant risks of collusion and supracompetitive pricing, which can lead to significant decreases in consumer welfare.”¹⁶

A Vibrant Wholesale Market Has Not Come to Pass. The FCC’s predictions in 2005 “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,”¹⁷ such that wholesale arrangements would continue to evolve from both cable and telephone Broadband Providers have also not come to pass. Indeed, while the FCC posited that the previous framework that promoted competitive access was somehow constricting the creativity of the Broadband Providers to enter into beneficial

¹³ Neither are satellite, broadband over powerline, or fixed or mobile wireless viable competitive alternatives. As the *National Broadband Plan* pointed out, these broadband services are not currently 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.”).

¹⁴ See *Wireline Broadband Order* at ¶ 50.

¹⁵ 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.”).

¹⁶ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, Memorandum Opinion and Order*, WC Dkt. 09-135, FCC 10-113, ¶ 29 (rel. Jun. 22, 2010) (“*Qwest Forbearance Order*”).

¹⁷ *Wireline Broadband Order* at ¶64.

wholesale arrangements,¹⁸ the facts have proved to be precisely the opposite: there have been no new “creative arrangements,” but instead a general pattern of anti-competitive practices designed to foreclose and severely limit consumer choice and constrain competitors.¹⁹ This is demonstrated by the significant changes in the independent ISP market that have occurred over the past decade. In 2001, ISP competition was flourishing with an estimated 6,000 ISPs offering a diversity of services to consumers.²⁰ This number is drastically reduced today, with only a handful of national companies offering independent Internet access service.

Information Service Functionality is Separable from the Transmission Component of Internet Service. Similarly, the facts today underscore that the information service functionality of Internet access service is not “inextricably intertwined” with the transmission component offered by Broadband Providers. In fact, some Broadband Providers today offer the Internet connectivity transmission separately from the information service, either as a tariffed or as a retail stand-alone telecommunications service.²¹ In addition, the few wholesale commercial arrangements for Internet connectivity that do exist also underscore that transport and information service can be separated as a market and engineering matter.

¹⁸ *Id.* at ¶ 63.

¹⁹ *See, e.g.*, Letter from Mark J. O’Connor, Counsel, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, at 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, at 2, CC Dkt. No. 02-33 (filed Aug. 18, 2003); Letter from Donna N. Lampert, Counsel, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, at 2, CC Dkt. No. 02-33 (filed Aug. 3, 2005).

²⁰ L. Kruger and A. Gilroy, *Broadband Internet Access: Background and Issues*, Congressional Research Services, IB10045 (May 18, 2001). *See also*, *Changing Media Public Interest Policies for the Digital Age*, Free Press Report, pp. 13-14 (Jan. 2009), available at http://www.freepress.net/files/changing_media.pdf (“Change Media”).

²¹ As the NoI (at ¶ 21, n.53) notes, hundreds of incumbent LECs today offer broadband transmission service as a tariffed telecommunications service under the NECA FCC Tariff No. 5. Moreover, some competitive LECs offer broadband as a stand-alone telecommunications service. *See also Brand X* at 1008 (Scalia, A., dissenting) (finding that the physical transmission component was a service distinct from the enhanced service).

Further, consumers have grown accustomed to looking to other information, content and applications providers, rather than the Broadband Provider that supplies Internet connectivity, for their information services, content and similar features, including email, spam and security protections, applications and DNS lookup.²² Broadband Providers also overwhelmingly market their broadband services using advertised download/upload speed features,²³ hallmarks of transmission services.

Notably, the FCC long operated under a framework that recognized the clear distinctions between the underlying transmission connectivity on the one hand and the higher-level enhancements on the other.²⁴ Under this framework – which is the basis of the statutory definitions that are part of the Communications Act today – regulation was targeted to the locus of concern.²⁵ For this reason, the FCC’s “contamination doctrine,” whereby the inclusion of an enhanced (information) service with a basic transmission telecommunications service resulted in

²² 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).

²³ For example, Comcast advertises “Economy Internet Service” with “downloads up to 1 Mbps and uploads up to 384 Kbps” starting at \$26.95 per month and “Extreme 50” with “downloads up to 50 Mbps, uploads up to 100 Mbps with PowerBoost®” starting at \$99.95 per month. See Comcast “Faster Internet” Product Offerings, available at <https://www.comcast.com/shop/buyflow2/products.csp?SourcePage=Internet&profileid=85485456-6CF6-48AE-AFE5-2AAC7939C070&dumy=a&INTCMP=ILCCOMCOMHS20975&Inflow=1&> (last visited Jul. 8, 2010).

²⁴ See, e.g., *Amendment of Section 64.702 of the Commission’s Rules and Regulations, Final Decision*, 77 F.C.C. 2d 384, ¶¶ 121-29, 168-72 (1980) (*Computer II*) (subsequent history omitted); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, 16 FCC Rcd. 7418, ¶ 46 (2001) (“*CPE/Enhanced Services Unbundling Order*”).

²⁵ Compare *Computer III Further Remand Proceedings, Report and Order*, 14 FCC Rcd. 4289, ¶ 7 (1999) (“The Commission has long sought to maintain appropriate safeguards for the provision by the BOCs of enhanced services.”), with, *Federal-State Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, ¶ 45 (1998) (“*Report to Congress*”) (“[I]n considering the statutory history of the 1996 Act, we note that at the time the statute was enacted, the *Computer II* framework had been in place for sixteen years. Under that framework, a broad variety of enhanced services were free from regulatory oversight, and enhanced services saw exponential growth.”).

the entire bundle being treated as an enhanced service, did not apply to facilities-based carriers such as the Broadband Providers at issue here.²⁶ Given the risk of anti-competitive conduct by these entities arising from their control of the underlying transmission, the FCC properly understood that the Internet access offerings of facilities-based carriers included a basic telecommunications service and a separate enhanced (information) service.²⁷

Independent ISPs Combine Enhanced Functions and Value-Added Services with Broadband Transmission Inputs. EarthLink's experience using wholesale broadband inputs also highlights the distinction between the Broadband Provider's role as supplier of the Internet connectivity transmission component and the role of ISPs in offering enhanced functions. Independent ISPs like EarthLink typically provide all applications included in the broadband Internet service, including email, webmail, web portal, toolbar, security, spam blocking, maintenance tools, client connection software and others. Value-added services provided by independent ISPs include premium security features, home networking, PC optimization software and email-by-phone. Independent ISPs also typically enable authentication for applications and, where independent ISPs utilize Layer 2/2.5 transport, they also perform the IP assignments. These applications and services are distinct from the Broadband Provider's underlying transmission inputs. Further, customers often access the Internet by authenticating via Proxy RADIUS to the independent ISP and typically use the independent ISP's domain name service (DNS) to resolve URLs.

²⁶ See, e.g., *Independent Data Communications Manufacturers Association, Inc., Memorandum Opinion and Order*, 10 FCC Rcd. 13717, ¶¶ 42, 44-45 (1995) (“*IDCMA Order*”) (declining to extend the “contamination theory” to the frame relay services of facilities-based providers).

²⁷ See *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.”).

Indeed, the relationship between an independent ISP using wholesale broadband inputs and a Broadband Provider confirms the distinction between connectivity and overlay information services. For instance, independent ISPs market the broadband Internet service, and typically build and maintain front-end systems that communicate with the back-end systems of the Broadband Providers to determine whether a customer is serviceable and what broadband access services (*e.g.*, transmission type, price, speed) are available to a customer. In terms of service provisioning, where the independent ISP acquires Layer 2/2.5 transport from the Broadband Provider, the independent ISP typically provides the Layer 3 termination (BRAS). Similarly, with respect to order fulfillment, independent ISPs typically provide the customer with a modem (DSL only) and a welcome kit (DSL and cable) as well as related client software to optimize login and setup.

Current Broadband Provider Practices Harm Consumer Choice, Investment and Innovation. In addition, the “current facts of the broadband marketplace”²⁸ demonstrate a steady pattern of reduced choices and missed broadband opportunities. Rather than “benefit American consumers and promote innovative and efficient communications,”²⁹ the gap in government oversight has solidified the Broadband Provider duopoly and led to diminished consumer choice and innovation. Ultimately, this has redounded to the detriment of consumers throughout the nation who have suffered higher prices and lower broadband speeds, especially as compared with other nations that have pursued pro-competitive policies.³⁰

²⁸ NoI at § II.B.2.

²⁹ *Wireline Broadband Order* at ¶ 1.

³⁰ See Mignon Clyburn, Commissioner, FCC, Statement Regarding Broadband Affordability and Competition (Mar. 10, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296790A1.pdf; Harvard University Berkman Center for Internet & Society, *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World*, 13- 14,

Despite the FCC's previous expectations,³¹ consumers have been denied options and access to independent broadband ISPs because Broadband Providers control the on-ramps and off-ramps of the Internet. While there were high hopes that the duopoly Broadband Providers would not be able "to exert considerable market power over unaffiliated entities in the provision of information services,"³² this market power not only endures, its negative effects are inescapable.

With limited but notable exceptions, such as the mutually-beneficial broadband arrangement EarthLink has with Time Warner Cable,³³ for the most part, EarthLink, like other independent ISPs, has been unable to expand its Internet services to consumers via cable-based broadband networks, 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 wholesale broadband arrangements have not been forthcoming. This inability to obtain wholesale broadband inputs from Broadband Providers translates into lost opportunities for

(Feb. 15, 2010), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf.

³¹ See, e.g., *Wireline Broadband Order*, 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.").

³² *Wireline Broadband Order* at ¶ 4.

³³ 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 American Online Inc. and Time Warner Inc., Decision and Order*, FTC No. C-3989 (Dec. 14, 2000), as a result of the mutually-beneficial results of that arrangement, the parties have extended the agreement beyond the expiration of the merger conditions.

consumers, decreased investment, diminished network utilization, and ultimately, reduced broadband adoption, usage and demand. EarthLink alone has ceased spending hundreds of millions of dollars annually that was formerly invested in expanding its competitive Internet services.

Even where the Broadband Providers have agreed (often under the auspices of merger conditions) to sustain wholesale broadband arrangements with independent ISPs, they have continued to flex their substantial broadband market power to charge wholesale rates 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 ISPs to compete.³⁴ Just as the FCC explained in the *National Broadband Plan*, “[w]holesale prices that are too high may deter efficient competitive entry. . . .”³⁵

Similarly, Broadband Providers often engage in discriminatory practices such as refusing to provision or limiting the provisioning of wholesale broadband inputs for Internet services to consumers who do not purchase affiliated services.³⁶ Alternatively, if Broadband Providers would sell standalone wholesale broadband access at reasonable prices, independent ISPs like EarthLink could offer consumers only the products they want, freeing consumers to choose among the variety of competitive options available today.

³⁴ As the Commission has noted in a related context, “there is little evidence, either in the record or of which we otherwise are aware, that the BOCs or incumbent LECs have voluntarily offered wholesale services at competitive prices once regulatory requirements governing wholesale prices were eliminated.” See *Qwest Forbearance Order* at ¶ 34.

³⁵ *National Broadband Plan* at p. 65, fn. 78.

³⁶ This tying practice significantly frustrates consumers’ access to affordable broadband alternatives, and impedes the goal of greater broadband adoption. Indeed, consumers who have terminated landline phone service are often immediately denied access to broadband via their wireline carrier.

B. Government Oversight is Necessary to Achieve National Broadband Goals and Ensure Consumer Choice

Since opponents will likely bring judicial challenges to the Commission's efforts to implement its *National Broadband Plan* goals and other broadband-related actions, the FCC's legal and jurisdictional foundation must be grounded clearly and fully in the Communications Act. The *National Broadband Plan* requires clear and rigorous FCC oversight to promote the four functions of the federal government that can spur broadband deployment and usage: policies that ensure robust competition; efficient allocation and management of government-controlled assets (*e.g.*, spectrum, poles, access to right-of-ways, etc.); reform of the federal universal service fund to support broadband adoption; and reforms that better leverage broadband advantages in areas such as education, health care, and government operations.³⁷

The *Comcast*³⁸ ruling upset the Commission's prior determinations in the *Wireline Broadband Order* and the *Cable Modem Ruling* that the FCC had expansive and sufficient Title I authority over the broadband services and practices of Broadband Providers. Indeed, the Commission's prior decisions were predicated on the Commission's ability to step in and correct any market abuses and anti-consumer practices. The *Comcast* decision undermines those predicates, and, at a minimum, now means that FCC reliance on Title I for a host of upcoming decisions on broadband is likely untenable. As Commissioner Clyburn explained, reliance solely

³⁷ *National Broadband Plan* at p. xi.

³⁸ *See Comcast Corp.*, 600 F.3d at 642. While the D.C. 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 FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) ("[t]he 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.").

on Title I would mean a “hodgepodge of long-shot attempts to cobble together just enough authority to accomplish our goals.”³⁹

Given this uncertainty, and in light of the facts regarding today’s broadband access marketplace, the FCC should proceed under the certainty of Title II. The FCC should conclude that the transmission services of Broadband Providers fall squarely within the FCC’s Title II jurisdiction, affording all parties substantial legal and business predictability. The FCC’s legal authority is set forth in the Communications Act⁴⁰ and in ample and longstanding precedent that affords it the discretion to subject services and providers to common carriage obligations when it is in the public interest to do so.⁴¹ Where Broadband Providers have the ability to exercise market power, have engaged in market practices that undermine competition, and have strong incentives to continue to thwart 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.

Classifying Broadband Providers’ Internet connectivity as a telecommunications service under Title II of the Communications Act not only follows FCC precedent, it is proven to drive innovation, investment and expansion of information services and applications, including

³⁹ Mignon Clyburn, Commissioner, FCC, Prepared Remarks at Media Institute Luncheon on Broadband Authority and the Illusion of Regulatory Certainty (Jun. 3, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298599A1.pdf.

⁴⁰ See 47 U.S.C. § 153(46) (defining “telecommunications services”).

⁴¹ See *NARUC v. FCC*, 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*”); *NARUC 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*).

Internet access.⁴² By providing much needed legal predictability, all broadband marketplace participants, including independent ISPs like EarthLink, will have greater incentives to make investments, including in areas of marketing, customer service, product development, Internet-related hardware and infrastructure, and information services.

II. THE “THIRD WAY” IS A REASONABLE APPROACH TO ENSURE GOVERNMENT OVERSIGHT OVER CRITICAL BROADBAND TRANSMISSION INPUTS

A. The “Third Way” is Minimally Intrusive and Narrowly-Tailored

The proposed Third Way approach is minimally intrusive as it would “simultaneously forbear[] from applying most requirements of Title II. . . save for a small number of provisions.”⁴³ Indeed, the NoI indicates that only the core obligations of Title II – described to include sections 201, 202, 208, 254, 222, and 255 – would be needed to allow the FCC to step in and attain its broadband goals.⁴⁴ This approach is both reasonable and narrow, seeking only to curb market abuses and attain valuable social objectives such as universal service and disabilities access. Notably, the Third Way would establish clearly that Section 201(b) and 202(a) of the Communications Act apply to Broadband Providers’ Internet connectivity. At the same time, it would clarify important FCC authority to meet key public interest objectives including universal service, protection of privacy, adequate and meaningful enforcement and assurance of disabilities access.

⁴² *Advanced Services Second R&O* at ¶ 20 (noting that ISPs play a critical role in deployment of advanced services, in furtherance of Section 706 of the 1996 Act, and that “[ISPs], as unregulated information service providers, will be able to package the DSL service with their Internet service to offer affordable, high-speed access to the Internet to residential and business customers. 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.”).

⁴³ NoI at ¶ 67.

⁴⁴ EarthLink notes that corollary provisions, *e.g.*, Section 206-209, related to enforcement should also be retained.

Reliance upon the FCC's Title II precedent, including the established Section 208 enforcement process, will serve as a much-needed legal and regulatory backstop to prevent and redress Broadband Providers anti-competitive practices. Broadband Providers, consumers, and independent information service providers (including ISPs) have a long history and substantial experience with this framework, which would immediately ensure that the FCC has sufficient, but narrowly-tailored, regulatory oversight.

Moreover, unlike deregulation in the wireless and wireline context which involved numerous proceedings over a number of years, the Commission proposes to substantially forbear from most of Title II at the outset. Indeed, the Third Way would appear to be even less regulatory than the "Title II light" approach the Commission has taken with commercial wireless services and the Title II regulation of non-dominant carriers (*e.g.*, competitive LECs and IXCs). This is significant because no party can reasonably argue that the Commission's regulation of commercial wireless carriers or of competitive LECs has significantly discouraged those providers from investing in their networks, or from offering innovative services to the American public. An even lighter approach, as envisioned by the Third Way, cannot be found to impede the investment incentives or innovations of the Broadband Providers. In fact, investment by other broadband companies, as well as small-to-medium businesses, would likely increase.⁴⁵

B. Non-Facilities Based ISPs Do Not Provide Telecommunications Services

As noted in the NoI,⁴⁶ the Commission has consistently held that non-facilities-based Internet access providers that are unaffiliated with a carrier offer only an information service,

⁴⁵ K. Jayakar, *et al.*, *Small Business and Broadband: Key Drivers for Economic Recovery*, Institute for Information Policy, Pennsylvania State University (Mar. 2010), *attached to* Reply Comments of the Open Internet Coalition, GN Dkt. 09-191 (filed Apr. 26, 2010) (discussing benefits of broadband to small- and medium-sized enterprises).

⁴⁶ NoI at ¶ 106.

and should not be subject to Title II regulation on this basis. These providers, while they utilize the telecommunications input, do not themselves provide a telecommunications service.⁴⁷ This approach has been successful in promoting innovation and investment.⁴⁸

Indeed, the marketplace facts today provide no basis to question this conclusion. Independent ISPs do not control Internet connectivity, have no ability to degrade or block traffic going throughout the broadband network, and have no financial incentives to engage in such activities (unlike Broadband Providers). This position is fully consistent with prior FCC determinations that independent and non-facilities based ISPs serve the public best under a non-regulated status.⁴⁹

Further, there should be no concern that an ISP affiliated with a Broadband Provider would be entitled to operate under a non-regulated “loophole” and “avoid compliance with consumer protection measures by relying on non-facilities-based affiliates to offer retail broadband Internet service.”⁵⁰ The FCC has extensive experience ensuring that these types of practices cannot be used to bypass fundamental statutory obligations.⁵¹ As the FCC has made clear, these schemes fail because the FCC can readily identify the underlying provider of Internet

⁴⁷ See *IDCMA Order* at ¶ 41; *Report to Congress* at ¶ 81.

⁴⁸ *Report to Congress* at ¶ 95 (“The Internet and other enhanced services have been able to grow rapidly in part because the Commission concluded that enhanced service providers were not common carriers within the meaning of the Act.”).

⁴⁹ *Advanced Services Second R&O* at ¶ 20 (“[O]ur conclusions will encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price. In turn, the Internet Service Providers, as unregulated information service providers, will be able to package the DSL service with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers.”).

⁵⁰ *NoI* at ¶ 106.

⁵¹ See, e.g., *Regulation of Prepaid Calling Card Services, Declaratory Ruling and Report and Order*, 21 FCC Rcd. 7290, ¶ 8 (2006), *vacated on other grounds in part sub nom. Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007); *IDCMA* at ¶¶ 40-46.

connectivity – not the affiliated ISP – as the provider of the transmission service. This means that regardless of how the Broadband Providers structure their affiliate arrangements, the critical Title II obligations apply to the practices of the Broadband Provider in its offering of Internet connectivity to end users and to independent ISPs.

III. THE COMMISSION SHOULD ENCOURAGE ISP CHOICE AND REASONABLE ACCESS TO WHOLESALE BROADBAND INPUTS

With respect to the “policy goals we should have for non-facilities-based Internet service providers,”⁵² EarthLink urges that the FCC reaffirm long-standing policies promoting competition among information service providers by expressly encouraging wholesale Internet connectivity arrangements between Broadband Providers and independent ISPs that are reasonable and that give choice to American consumers to select among a diverse array of ISP offerings. In the current monopoly/duopoly broadband access environment, ISP choice is also essential for those consumers who either choose not to purchase the bundled offerings of the Broadband Provider or who cannot afford to purchase these higher-priced bundled offerings.

Independent ISPs offer consumers a chance to “break the bundle” and purchase only the services that they want and can afford. Independent ISPs also offer consumers the ability to “cut the cord” with their landline telephony or cable television service and yet still retain a broadband connection, but only where Broadband Providers do not tie telephone service or cable television service with their Internet connectivity. Moreover, independent ISPs enable fuller utilization of broadband access networks and ensure robust competition, which drives up Broadband Provider revenues, investment, innovation and ultimately, broadband deployment and usage. Competition from independent ISPs also will promote broadband practices that encourage, and do not

⁵² NoI at ¶ 106.

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dampen, an open Internet. Independent ISPs can also provide outstanding customer service which, in turn, will provide the impetus for all providers to offer a higher level of customer service, ultimately benefitting consumers and improving broadband adoption. Regardless of whether the Commission decides to close the extant docket that accompanied the *Cable Modem Declaratory Ruling*,⁵³ the Commission should make clear that choice of broadband Internet services is a paramount goal for our nation. Consumers deserve the benefits flowing from more vibrant ISP competition.

CONCLUSION

For the foregoing reasons, EarthLink urges the FCC to assert its Title II authority to promote its broadband goals, protect consumers and foster competition for broadband services.

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⁵³ See NoI at ¶ 111.