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Before The
COMMITTEE ON THE COMMERCE, SCIENCE AND TECHNOLOGY
U.S. SENATE

Hearing on
"S. 2686, the Communications, Consumers' Choice,
and Broadband Deployment Act of 2006"

June 13, 2006

Mr. Chairman, Senator Inouye, Members of the Committee, thank you for inviting me to speak to you as you consider S. 2686, and how best to update our communications laws in light of change in technologies and marketplace conditions, to preserve the competition, innovation and freedom that characterize the Internet, and to ensure that all Americans – including low income Americans and those in the most rural parts of our country – receive the benefits of the broadband revolution.

For ten years, EarthLink has been on the cutting edge of delivering the Internet to American consumers and business, first through dial-up, then broadband and now VoIP, wireless voice and municipal wireless Internet services. Over the past ten years, we've seen the Internet grow from the specialized province of a few tech-savvy early adopters to an integral part of American work and family life. And we've seen – and helped – millions of Americans move toward broadband services and capabilities that were not possible with dial-up services.

Our approach has been to deliver our customers the services they want: Our motto is "we revolve around you." And we've been successful. Over the past three

years, EarthLink has won numerous awards for customer satisfaction in both broadband and dial-up services. We now deliver to our customers a full-range of broadband services and applications, including Internet access, Voice over IP, and wireless services. We offer our customers a wide range of enhanced offerings, including pop-up, spam and spyware blockers, anti-virus protection, and parental controls. We are excited to work with the Cities of New Orleans, Philadelphia, San Francisco and Anaheim – and we hope many more – to deploy a new wi-fi network providing the residents of those cities an alternative to the cable – telephone company high-speed wireline access duopoly.

At the outset, I'd like to commend the Committee, and particularly its staff, for all the hard work you have put in so far. S.2686 takes some key steps towards an appropriate regulatory framework for broadband communications. In particular, we commend the provisions making clear that local governments may seek creative solutions to bring broadband – or more broadband – to their communities, and the bill's recognition that VoIP providers – like wireless carriers and CLECs – need to be able to interconnect and exchange traffic with traditional telephone networks. But there are also areas where the draft could be improved, particularly with respect to what has come to be known as net neutrality. We are also concerned that the current draft cuts back on the interconnection, numbering and number portability rights for VoIP providers, and that the bill does not yet contain a standalone broadband requirement, as proposed by Senators Snowe, Dorgan and Inouye. These are all elements that are critical to delivering the "consumers' choice" promise of the bill's title.

As you consider further how to shape the legislation that has moved forward, I would like to leave you with five key thoughts:

1. A local facilities-based access duopoly does not provide sufficient choice to drive innovation and preserve consumer freedom to use the services and applications of their choosing. The bill's municipal broadband provisions therefore appropriately ensure that consumers have as much choice as is possible, without fear of taxpayer funding or financing.
2. Remember that the Internet (like the market) has become a dominant economic force because it lets a thousand economic flowers bloom, and does not let the network operators (or any other centralized authority) determine which flowers take root. Net neutrality protections are therefore critical to maintaining consumer choice and innovation.
3. Protect consumer freedom by requiring that broadband be available on a standalone basis.
4. Promote competition by ensuring that all VoIP providers can obtain numbers, utilize number portability, and interconnect and exchange traffic with the legacy telephone network. In that context, while providers should be entitled to and pay fair interprovider compensation, recognize that the current intercarrier compensation system on the legacy telephone network is hopelessly fractured, and thus both empower and require the FCC to reform that system quickly.
5. In ensuring that all communications service providers contribute to universal service, ensure that any mechanism is competitively neutral.

I. Municipal Broadband is Critical to Broadband Deployment and Consumer Choice.

A. Facilities-Based Duopoly is not Sufficient to Protect Consumers and Drive Innovation.

This Committee has long recognized that while duopoly is better than monopoly, a duopoly by itself does not necessarily serve consumers well nor lead to maximum innovation. The history of wireless services, for example, cautions strongly against relying on a facilities-based duopoly to deliver strong competitive choices and marketplace innovation to consumers. From 1984 until the first broadband PCS services began to be offered in 1995, wireless services were a legally-sanctioned duopoly. Not surprisingly, prices rose until 1993, when Congress voted to authorize new wireless entry through spectrum auctions – of which Chairman Stevens was an early and leading

champion.[1] Duopoly created wireless services that were priced for only a few, relegating wireless to a niche market.

On the other hand, since the third and fourth (and more) wireless competitors entered the market in 1995-96, competition in the wireless market has exploded. As stated above, wireless subscribers have soared from only 20 million in 1994 to nearly 200 million as of June 2005. In 1993, wireless service averaged 58 cents per minute,[2] but by the end of 2004 was averaging 9 cents per minute – a nearly 85 % drop.[3]

The same market performance can be expected in broadband as well. If there are only two facilities-based broadband providers, competition will stagnate and consumers will not reap the full benefits of the broadband revolution. Broadband today is characterized by a cable-telco duopoly, with cable modem service and ILEC-provided DSL together accounting for 95% of all residential and small business broadband connections nationwide.[4]

However, if a stable duopoly is not permitted to develop, the market will keep competitive pressure on all providers and force the two dominant facilities-based providers, cable and ILEC DSL telephone companies, along with all other market participants, to continue to innovate to the benefit of consumers. Unfortunately, the FCC's decisions have moved to shore up rather than challenge the existing access duopoly. In its *Wireline Broadband Order,* for example, the FCC allowed incumbent

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[1] *See* http://wireless.fcc.gov/statements/Sugrue_slides3.ppt.
[2] *Id*.
[3] *Implementation of Section 6002(b) of the Omnibus Budget Reconcilliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Tenth Report, 20 FCC Rcd 15908, 15966 (¶ 158) (2005).
[4] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, High-Speed Services for Internet Access: Status as of June 30, 2005, at Table 6 (April 2006), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2006/db0407/DOC-264744A1.pdf.

telcos to stop providing last-mile broadband transmission as wholesalers. As a result, in mid-May, for example, AT&T notified its wholesale broadband customers that it had stopped accepting new orders for wholesale DSL two weeks earlier, as of May 1, 2006. The minority draft legislation notably – and properly – would reverse that change, and treat these services with market power as telecommunications services. As another example of a regulatory action that buttresses duopoly, the FCC's curtailed CLEC access to unbundled loops in Omaha, Nebraska – including loops used for competitive DSL service – because of *cable voice* competition, effectively raising the price for a CLEC to use UNE copper loops combined with its own electronics to deliver alternative broadband services in competition with the cable company and incumbent telco.

Moreover, the nationwide stability of that duopoly also keeps growing as the telcos and cable companies each respectively merge, with the proposed AT&T/BellSouth potentially reaching half the homes in the country. This will no doubt put pressure on both Verizon and the cable companies to strive for similar scale. Time Warner and Comcast are already dividing up Adelphia between them.

Shoring up the existing duopoly has real consequences. For one thing, it makes net neutrality a more significant issue. As analyst Blair Levin wrote earlier this year, the net neutrality debate *is* fundamentally about the market power of the current broadband telco/cable duopoly. It is much easier to have an Internet "gatekeeper" when there are only two gates. I'll return to net neutrality later.

In addition, we should remember the lessons of both 9-11 and New Orleans. Having more communications networks – rather than just a duopoly – means we have more ways to keep communications up and running in a crisis. In particular, on both 9-

11 and in New Orleans and the Gulf Coast after Hurricanes Katrina and Rita, the Internet proved to be an important means for keeping communications flowing, both among first responders and among victims and their families.

B. Municipal Broadband – Antidote to Duopoly

As S. 2686 recognizes, the best way to address problems with duopoly is to expand the number of unaffiliated alternatives – just as Congress did with wireless in requiring that new spectrum be distributed for broadband PCS. At EarthLink, we are actively exploring alternatives to telco and cable. We are not limiting our efforts to municipal broadband. For example, we are an investor in a broadband-over-powerline project with Current Communications.

EarthLink's municipal deployments illustrate the promise of municipal broadband. We are very proud to assist the City of New Orleans rebuild its infrastructure as it recovers from the devastation of Hurricane Katrina. Underscoring the public safety advantages of having a third broadband network, our wireless network will give New Orleans' city officials and first responders another way to keep communications networks operating in the event of another, unthinkable tragedy.

Our path-breaking New Orleans and Philadelphia deployments shows how much can be accomplished with no risk to taxpayers:

- EarthLink will build, own and manage the wireless network, at no cost to the cities, while providing the cities a revenue share to fund its operation. And, EarthLink has guaranteed network upgrades on an ongoing basis. This is not a case of "taxpayer funded" competition, and will not lead to taxpayer funded bailouts. Nor is it funded by tax-free bonds. *EarthLink* is bearing the risk of constructing this network.

- This network will serve all the citizens of New Orleans and Philadelphia by providing a competitive alternative to current broadband and dial-up Internet services – at retail rates at or below the common price of premium dial-up Internet access.

- The initial service offering will be a symmetric One Megabit per second (1 Mbps) service, which is about fifty times as fast as a dial-up connection. It's nearly as fast as a typical DSL line for downloads, and is actually faster than most of today's broadband services when uploading data. Once we have the initial service deployed, we expect to offer higher tiered services up to several times that fast, and we will upgrade the network over time so that ever higher speeds are enabled as new technology becomes available.

- EarthLink supports Open Access to third-party Internet service retailers and "Net Neutrality." So, the project will provide opportunities for many local companies to resell broadband access service that they purchase at competitive wholesale rates. As the third broadband entrant in this market, we embrace competition as a way to make the use of our network more attractive. And the same is true for "Net Neutrality." We view this as the best way to serve the consumer and embrace innovation and competition.

- In Philadelphia, EarthLink's partnership with Wireless Philadelphia will help bridge the Digital Divide, subsidizing affordable high speed Internet access to low-income households in overlooked neighborhoods.

These deployments will catapult New Orleans and Philadelphia into a worldwide leadership position in technology and will enable officials to meet the needs of their residents as well as enhance the visitor, tourism and business climate of those great cities. But, EarthLink is already taking this story on the road! In Anaheim, San Francisco and Milpitas, California, EarthLink has been selected as the municipalities' private sector partner. And EarthLink has (or soon will) propose that we unwire other municipalities – at our cost – across America, including:

- Honolulu, Hawaii;
- Houston, Texas,
- Boston, Massachusetts,
- Long Beach and Orange County, California.
- Milwaukee, Wisconsin,
- Arlington, Virginia;
- Minneapolis, Minnesota.

We also believe, however, that the EarthLink approach of partnering private sector expertise and capital with municipalities can also be harnessed to expand broadband options in small cities and rural areas across America. EarthLink is developing a "Network Alliance" program with just this goal in mind.

Local entrepreneurs know best the local consumer and business needs for broadband access and services. EarthLink's Network Alliance program will aid these local businesses in partnerships providing:

- EarthLink's technical expertise in network design, deployment and specifications;
- EarthLink's volume pricing for equipment and services – so even the smallest companies will get the best prices; and
- EarthLink's ordering, billing and other back-office services – so these local businesses can put full focus on building out networks and signing on customers.

Our New Orleans and Philadelphia projects are great examples of what local governments and the private sector can accomplish together, as the bill envisions. And so there record is clear, Philadelphia and other cities across the country solicit competitive bids for their projects. EarthLink has participated in other competitive bids around the country – with a recent successful example being San Francisco.

S.2868 takes the most necessary step with respect to municipal broadband, and that is to preempt state and local laws that prohibit or have the effect of prohibiting locality-driven broadband. It also appropriately requires municipalities that provide broadband act non-discriminatorily when applying its ordinances and rules, particularly those involving rights-of-way, permitting, performance bonding and reporting.

We also believe that many of the changes made in the June 9 staff draft improve this section of the bill, and we commend the staff for making these changes. First, the

June 9 draft eliminates a provision that would have required a public provider to grant a requesting non-governmental entity the right to place similar facilities in the same conduit, trenches and locations, subject to a public safety exception. While well-intentioned, this requirement would have been difficult to implement. For example, antenna locations can have limited capacity, depending on load and other engineering factors, as well as the need to space facilities to prevent them from interfering with one another. As originally drafted, the bill would have made it difficult to execute construction schedules.

Second, the June 9 draft more appropriately makes clear that the municipal broadband provisions of this law do not preempt generally applicable telecommunications laws, rather than making the application of all generally applicable laws a condition precedent to providing service. One suggestion we offer here is that the June 9 draft states that this bill does not displace telecommunications laws that are generally applicable to public providers. Given the nondiscrimination goals, as well as the goal of enabling public providers to offer broadband service, what should be preserved is the application of telecommunications laws that apply to all providers, not just public providers.[5]

Third, the June 9 staff draft appropriately encourages public-private partnerships, without creating difficult line-drawing issues that the original bill created with respect to what constitutes a public-private partnership. The original bill could have been interpreted to include the mere lease of tower sites or other rights of way does not create a public-private partnership, and then imposed various competitive bidding requirements.

[5] Accordingly, in proposed Section 706(d)(2), on page 116, line 9, of the June 9, 2006 Staff Draft the words "such public" should be deleted.

The provisions of the staff draft are better, particularly given the fact that states and local governments have their own competitive bidding requirements.

Fourth, the staff draft appropriately deletes the mandated "right-of-first-refusal" for local projects that are not competitively bid public-private partnerships, along with what could have been unduly costly and burdensome neutral evaluation requirements. This will particularly help small localities that might lack the resources to carry out all the previous requirements.

Finally, we note that the general public safety exemption (new subsection 706(g) of the Telecommunications Act of 1996) in the original bill, while again well-intentioned, raised questions as to what rules apply to network deployments that are dual use, i.e., with a portion for public safety and a portion for the general public. Experience has shown that, particularly in smaller towns and rural areas, it is important to aggregate communications demand and to make common use of facilities where possible. Having two sets of requirements, one for public safety and one for other uses, limits the ability to obtain the economies of scale and scope that will make these deployments affordable in smaller and rural communities, and which otherwise promote important public interest objectives such as public safety. The June 9 staff draft appropriately eliminated that provision.

II. Net Neutrality – Keeping the Internet Working Through Freedom and Innovation.

It is undisputable that the reason the Internet has been a transformative engine for economic growth and innovation is that the Internet is an open communications platform.

As Vint Cerf, the father of the Internet, previously told this Committee, the open Internet allowed companies like EarthLink, Google, Yahoo!, e-Bay, and Amazon to grow from an entrepreneur's dream to successful Internet businesses. Small companies and entrepreneurs can use the Internet to prove the worth of their ideas without having to convince a bureaucrat at a cable or telephone company of their economic merit – or having to pay a "success" fee to those network duopolists. The Internet drives growth because – like the market as a whole – it allows a thousand flowers to bloom without central planning or management.

At EarthLink, we lived this history. If the telephone companies had had their way, our pioneering dial-up Internet access business would have been shut down by imposing per-minute access charges. Instead, because the FCC did not allow the telephone companies to become Internet toll collectors, millions of Americans were able to gain familiarity with the Internet, building the critical customer awareness and interest in the Internet that enabled broadband products to be successful when launched. Moreover, because the consumer connected to the Internet with an ordinary telephone call, the telephone companies were not permitted to try to favor some Internet services over others.

Going back to our days battling AOL in the Internet services marketplace, EarthLink has long recognized that consumers are not best served by exclusive-access Internet networks. We believe that consumers are best served by an Open Access model – where network owners offer fair, reasonable and non-discriminatory wholesale rates to others who seek to bring customers to that network. And we don't just pay lip service to this model – as a network operator, we live up to the vision. EarthLink's municipal

networks are open networks. Any qualifying ISP will get the same low wholesale rate, and we welcome them to bring consumers to our network. And, we welcome the competition that ensues – it will ultimately deliver the best service and experience to consumers.

As a network investor and operator, EarthLink rejects the argument by the telephone and cable duopolists that networks must be closed and applications subject to a "success tax" in order to promote network investment. We embrace "Net Neutrality" because it is both consumer friendly and economically right. We will succeed by adding users and by providing our (and our wholesale customers') users better service, not by throttling web-based innovation and business models. When EarthLink and our local government partners expand the number of facilities-based networks providing Internet access, the marketplace can better police and ensure "Net Neutrality." This model of competition obviating the need for regulation is exactly what happened with wireless resale requirements after this Committee ended the wireless duopoly through spectrum auctions.

So how can this Committee address net neutrality in the time until there is sufficient competition to eliminate any concerns even without regulation? I offer a few thoughts.

First, recognize, as analyst Blair Levin has commented, that net neutrality is about market power in the local portion of the broadband network, and not about the Internet "cloud" or backbone. Accordingly, as Mr. Levin has put it, the more networks, the less the concern – provided those networks are not affiliated (as some wireless and telco

networks are). A gatekeeper can discriminate and exercise market power only when there are a very small number of gates.

Second, discrimination is particularly significant when bandwidth in the last mile is scarce. Put another way, a network can meaningfully discriminate through the last mile best if the last mile can't handle all the bits the consumer wants.

Third, the Committee, and policymakers in general, should be particularly skeptical of network operator claims for a need to discriminate with respect to low-bandwidth (e.g. VoIP and e-mail) or high latency (e.g. streaming video for storage on a TiVo) services and applications.

What this leads to is that, in order to preserve the open innovative nature of the Internet and consumers' freedom to choose their applications and services until there is sufficient competition – and at least until consumers are so awash in broadband capacity that network neutrality that discrimination cannot be executed – EarthLink supports adoption of some clear rules, building on the FCC's broadband policy principles. In this regard, we believe that the bill recently introduced by Senators Snowe, Dorgan and Inouye would provide a strong, interim assurance that the Internet will remain a vibrant driver of and tool for innovation.

III. Empower Consumers through Standalone Broadband.

Another provision of the Snowe-Dorgan-Inouye bill that I commend for inclusion in S. 2686 is the provision on standalone broadband. As the Committee is well aware, in many instances, consumers who want to purchase DSL service must also purchase voice telephone service. Those types of requirements frustrate consumer choice by precluding

consumers from buying DSL service from a BITS provider, while using another provider's VoIP service in lieu of the BITS provider's traditional circuit-switched (or VoIP) voice service.

There is no reason to permit this type of gamesmanship that blocks consumer freedom to choose. Cable companies, by and large, already permit their customers to buy broadband Internet access without buying video services. As conditions of their megamergers, the nation's two largest ILEC BITS providers, Verizon and SBC, have committed – for two years – to offer such stand-alone or "naked" DSL services to 80% of their customers. Qwest has said that it will offer stand-alone Internet access services.

This consumer freedom should not be temporary, and should extend beyond the two years pledged by AT&T and Verizon as part of their recent merger approvals. All consumers should be given the freedom to choose the service that best meets their needs, unfettered by tying arrangements designed to protect legacy businesses.

IV. Interconnection and a Rationalized Interprovider Compensation System are Critical for VoIP and Universal Service.

One other set of provisions that are critical to delivering on the bill's promise of consumer choice are its provisions regarding the interconnection rights of VoIP providers, and the attendant universal service and intercarrier compensation obligations of VoIP providers. Today's system doesn't serve competition or universal service well, with regulatory uncertainty plaguing all industry participants.

This Committee is well aware how critical interconnection, as well as access to numbers, number portability and fair interprovider compensation arrangements, are to allowing consumers to have real choice and benefits from VoIP competition. Again, for

evidence of why this is necessary we need look no further than our collective experience with wireless. Over the past ten years, we have seen an explosive growth in wireless services. In 1994, there were fewer than 20 million wireless subscribers; today, there are over 200 million – a more than ten-fold increase.

Prior to the 1996 Act, wireless faced extremely unbalanced terms when it exchanged traffic with incumbent local telephone companies. In some cases, wireless carriers paid the incumbent telephone company for every minute of traffic that the wireless carrier received from the incumbent LEC, and it also paid the incumbent LEC for every minute of traffic that originated from a wireless customer but terminated to a telephone number on the traditional public switched network.[6] These arrangements were hardly surprising. In 1996, wireless carriers were much smaller than the incumbent LECs, and had many fewer subscribers. Few incumbent LEC subscribers would therefore be inconvenienced if they were unable to call out to, or receive calls from, a wireless customer. However, the wireless carriers were dependent upon the incumbent LECs to handle all but the then very small fraction of calls placed between wireless consumers. The incumbent LECs were thereby able to use their market power over interconnection to extract fees from wireless carriers, regardless of whether traffic originated from the incumbent LEC's wireline customer or from the wireless carrier's

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, 16037, 16044 (1996) ("*Local Competition Order*")(CMRS carriers complain "that they are unable to negotiate interconnection arrangements based on mutual or reciprocal compensation because of incumbent LEC bargaining power;" "the problem of achieving mutual compensation is further compounded because incumbent LECs not only charge rates that bear no relationship to their costs but also refuse to compensate CMRS providers for termination of landline-originated calls;" "incumbent LECs even charge CMRS providers for terminating incumbent LEC-originated calls"; "we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks.")

customer. From the ILEC's perspective, it was able to insist on "heads I win, tails you lose" compensation for traffic exchange. This allowed the incumbent LECs to raise wireless carriers' costs, thus inflating the prices that wireless carriers had to charge to their customers and thereby limiting wireless carriers' competition with landline services.

The 1996 Act changed all of that. Under the 1996 Act, for all local calls, an incumbent LEC could charge a wireless carrier (or, for that matter, a CLEC) for traffic that the wireless carrier originated, but could no longer charge a wireless carrier for traffic that the originated from an incumbent LEC's own customer.[7] Moreover, under the 1996 Act, the wireless carrier is entitled to compensation for all local traffic that originates on the ILEC's network and terminates on the wireless carrier's network: the rate the ILEC pays the wireless carrier mirrors the rate that it charges the wireless carrier. Furthermore, the FCC ruled that reciprocal compensation rules, and not intrastate and interstate access charges, would apply to all CMRS traffic that originated or terminated within a "Major Trading Area," a large region used for PCS licensing that was much larger than traditional ILEC local calling areas.

There were two significant results from these changes with respect to wireless intercarrier compensation. First, incumbent local telephone companies could no longer use traffic exchange fees to increase a wireless carrier's costs and thus prevent a wireless carrier from offering prices that would compete with the incumbent local telephone company's core services. By making these charges cost-based and symmetrical, all carriers were required to compete. Second, because the traffic exchange fees that wireless carriers paid were no longer strictly tied to ILEC traditional wireline local

[7] Technically, the 1996 Act's reciprocal compensation rules apply to all traffic that is not interstate or intrastate exchange access, information access or exchange services for such access. *See* 47 C.F.R. 51.701.

calling areas, wireless carriers were able to offer regionwide and national calling plans. This led directly to the emergence of today's popular wireless one-rate bucket pricing plans.

We urge that S. 2686 fully incorporate the core teachings of the wireless experience and applies those lessons to broadband and VoIP. Like pre-1996 wireless carriers, VoIP providers will be very small relative to the incumbent LECs, and will have a much greater need both to receive calls from and terminate calls to the ILEC's customers than the ILEC will need to do with respect to the VoIP provider's customers. This asymmetric market power is exactly what led to the asymmetric charges between incumbent LECs and wireless carriers prior to 1996. Should the large incumbent telephone companies be able to impose those unbalanced, asymmetric charges far above cost-based levels, the incumbents will be able to squeeze VoIP out of competition for mainstream consumers, and relegate VoIP to a niche – much as wireless occupied only a niche prior to 1996.

Accordingly, S.2686 should, as the original draft did, give all VoIP providers, not just "facilities-based" VoIP providers the rights to obtain telephone numbers, to port numbers, and to interconnect with the local telephone network. If "facilities-based" is defined too narrowly, a provider such as EarthLink, which purchases wholesale DSL from both CLECs and ILECs to offer its services, could be denied interconnection, telephone numbers and number portability simply because it doesn't physically own or provision its last-mile transmission facilities. Provisioning the "last-mile" shouldn't be the test for interconnection, number portability or access to numbers, so long as the VoIP provider is operationally present – itself or through an agent – in the area in which it

wants to exchange traffic with the legacy telephone network. In our view, the changes made by the June 9 staff draft here head in the wrong direction.

Second, EarthLink recognizes the critical importance of universal service, and stands ready, as a VoIP provider, to contribute to the federal universal service mechanisms. As an ISP, CLEC, and VoIP provider, EarthLink today pays both directly and indirectly to support universal service. The Committee is properly considering how that universal service payment mechanism can be improved and broadened.

We embrace our duty to support universal service: universal service ties our country together and brings economic and educational opportunity to all corners of our country. As the staff draft correctly recognizes, a cornerstone of any mechanism must be that whatever mechanisms it authorizes the FCC to adopt are competitively neutral and do not require us to engage in complex legal exercises to determine whether a particular dollar of customer revenue is subject to or outside of universal service assessment. Today's mechanisms are flawed in both respects. We also urge that if the bill is going to permit states to assess universal service fees, as the staff draft does, that those fees not extend more broadly than to the services covered by the federal mechanism, and that there be some limits on the magnitude of those state fees.

Third, while we do not object to the idea, as the staff draft contemplates, that providers should pay each other fair interprovider compensation, we are concerned that neither S.2686 nor the staff draft empower or direct the FCC to make sure the interprovider compensation system is fair, rational, and economically sustainable as a precondition of those obligations. The current intercarrier compensation system on the public switched network is universally recognized to be Byzantine, economically

irrational and broken. Today's system imposes different charges for the same use of the network depending of whether a call is "local," interstate "long distance" or intrastate "long distance," whether it is a wireline call or a wireless call, and whether it is an information service or a telecommunications service. Unless S.2686 addresses this issue head-on, it will leave a gaping hole that will ultimately defeat all of the bill's goals, including consumer choice, broadband deployment and the preservation of universal service. Accordingly, the Committee should adopt the provisions of the minority staff draft that both give the FCC the authority to address interprovider compensation issues and require the FCC to take action to reform the current system within 180 days.

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Before I close, I Leave you with a note of caution on a topic not addressed by the S. 2686 or the staff draft – forbearance under Section 10 of the Communication Act. The FCC has taken an extremely expansive view of its forbearance authority, and without necessarily requiring that a competitive marketplace be supplying what regulation was assuring. So, for example, the FCC has consistently cut back on the scope of Section 251(c)'s unbundling requirements, going so far as to forbear from Section 251(c) entirely with respect to unbundled loops in Omaha, Nebraska. The FCC did not so because a competitive, wholesale market for loops had developed (in which case forbearance would make sense) but because the cable company – which didn't use unbundled loops – was able to serve residential customers over its cable plant. And perhaps even more troubling, the FCC recently allowed a forbearance petition to be granted by *inaction.* In other words, the FCC simply let a private party assume the FCC's delegated rulemaking authority by refusing to act. This raises very troubling and serious

constitutional issues – most notably whether an administrative agency can, through inaction, allow a private party to rewrite the laws without any affirmative governmental action, let alone action by the Congress and a signature of the President.

On behalf of EarthLink, I thank the Committee for the opportunity to present these views. The staff has done yeoman's work, and presented you with a thoughtful starting point for further legislative efforts. By continuing to promote additional broadband competition, and by preserving the Internet's essential character as a place that fosters economic innovation without duopoly control, the Committee can craft a truly pro-consumer, pro-innovation legislative framework for broadband services.