Testimony of

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FCC's decisions have moved to shore up rather than challenge the existing access

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"Reconsidering Our Communications Laws:
Ensuring Competition and Innovation"

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Mr. Chairman, Senator Leahy, Members of the Committee, thank you for inviting me to speak to you as you consider how our nation's communications laws should best be updated to ensure competition and innovation in light of rapidly changing technologies but also the re-concentration of our communications industries. Over the past several years a procession of court and regulatory decisions have steadily marched our communications markets towards a less than fully competitive duopoly, potentially forswearing the tremendous innovation and consumer freedom that comes with more robust, open competition.

For ten years, EarthLink has been on the cutting edge of Internet innovation, 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.
As economists would predict, 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. And we are excited to be working with the Cities of New Orleans, Philadelphia, San Francisco and Anaheim 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.
As you consider how our communications laws should be revised to promote competition and innovation, I would like to leave you with four 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.
2. Municipalities working with the private sector to deliver broadband present a viable alternative to duopoly in many markets, without "taxpayer funding" of competition.
3. 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.
4. Consumers - not telephone companies - should be able to decide when they want to buy voice and video services in addition to broadband. Tying broadband to voice in order to protect legacy telephone company voice services against competition from VoIP services is fundamentally anticompetitive. And interconnection remains necessary for competition.

I. Facilities-Based Duopoly is not Sufficient.

As this Committee knows well, while duopoly is better than monopoly, a duopoly by itself does not necessarily serve consumers well. Within communications markets, 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 offered in a legally-sanctioned duopoly. Per-minute prices for wireless service peaked in 1993, the same year Congress voted to authorize new wireless entry through spectrum auctions. 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, but by the end of 2004 was averaging 9 cents per minute - a nearly 85 % drop.

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.

However, if a stable duopoly is not permitted to develop, the market will keep competitive pressure on all providers and force the two dominant providers, cable and 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 duopoly. In its Wireline Broadband Order, for example, the FCC allowed incumbent telcos to stop providing last-mile broadband transmission as wholesalers. As a result, for example, AT&T in mid-May notified its wholesale broadband customers that it had stopped accepting new orders for wholesale DSL two weeks earlier, as of May 1, 2006. As another example, 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 over the "last-mile." 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.

II. Municipal Broadband - Antidote to Duopoly

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. For example, we are an investor in a broadband-over-powerline project with Current Communications. Another particularly promising alternative is municipal broadband - without "taxpayer funding" or "taxpayer financing."

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.

? Municipal broadband networks also open the door for innovative uses of information technology to keep more cops on the street on patrol, allowing them to fill out routine paperwork at the accident or crime scene, rather than having to drive back to the station to do it.

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:

? Milwaukee, Wisconsin,
? Honolulu, Hawaii,
? Houston, Texas,
? Boston, Massachusetts,
? Long Beach and Orange County, California,
? 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 municipal broadband projects in Philadelphia, New Orleans, San Francisco, and others, are great examples of what local governments and the private sector can accomplish together.

Unfortunately, in some states there have been efforts to ban these successful public/private partnerships that provide broadband without taxpayer financing. Legislation such as the S. 1294, the Community Broadband Act, authored by Senators Lautenberg and McCain to preempt state and local laws that prohibit or have the effect of prohibiting locality-driven broadband. As a safeguard for the private sector, that bill would also appropriately require municipalities that provide broadband also act non-discriminatorily when applying its ordinances and rules, particularly those involving rights-of-way, permitting, performance bonding and reporting.

III. 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 testified, 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.

Moreover, as a network investor and operator, EarthLink rejects the notion that networks must be able to discriminate and coerce application providers into paying a "success tax" in order to promote network investment. Networks succeed because its users find it valuable and can use it to obtain the services they want - not just the services the network operator chooses to promote.
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). Thus, we need municipal broadband networks, broadband over power lines, and any other alternative to the cable and telephone company broadband pipes. And we need vigorous antitrust enforcement to make sure that these additional competitors are neither strangled nor acquired by their incumbent competitors.

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 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 S. 2917, 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. Any legislation should be sure to preserve the ability of the antitrust authorities - both federal and state - to police anticompetitive behavior.

IV. Empower Consumers through Standalone Broadband and Interconnection.

One other necessary consumer protection - which is also contained in S. 2917, introduced by Senators Snowe, Dorgan and Inouye - is the requirement that broadband be offered on a standalone basis, and not just bundled with voice or video products. As the Committee is 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 one provider, while using another provider's VoIP service in lieu of the broadband provider's traditional circuit-switched (or VoIP) voice service. 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 DSL providers, Verizon and AT&T, have just committed - for two years only - 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. All consumers should be given this choice, unfettered by tying arrangements designed to protect legacy businesses.

Here is why this makes a difference. EarthLink has a service that allows a consumer to use her broadband connection as a replacement for her home or business telephone service, using VoIP technology. When the incumbent telco forces the consumer to buy a legacy voice service in order to get DSL, it is trying to foreclose the consumer from using EarthLink's VoIP service. Standalone DSL liberates the consumer to choose the best voice service that fits her needs - the essence of competition.

But standalone broadband isn't enough. VoIP providers also need to be able to interconnect with the legacy telephone system. 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. 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 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. 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, and the rate the ILEC paid the CMRS carrier had to mirror the rate that it charged the CMRS carrier. Furthermore, the FCC ruled that reciprocal compensation rules 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 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.

Any new legislation must appreciate the core teachings of the wireless experience and apply those lessons to broadband. 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. Moreover, those consumers should be able to switch service providers - including to and from VoIP service - without changing their telephone numbers. Accordingly, any legislation should extend the rights and obligations of requesting telecommunications carriers to VoIP providers.

If there is a note of caution, however, it is that 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 do 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.

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On behalf of EarthLink, I thank the Committee for the opportunity to present these views. This Committee is acutely aware of the importance of free and open competition in driving innovation. 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 help ensure a truly pro-consumer, pro-innovation legislative framework for broadband services.