Sher & Blackwell
ATTORNEYS AT LAW
Suite 900 • 1850 M Street, N.W. • Washington, D.C. 20036
Telephone: 202.463.2500 • Facsimile: 202.463.4950 • www.sherblackwell.com
A LIMITED LIABILITY PARTNERSHIP

WRITER'S DIRECT DIAL
(202) 463-2510

April 12, 2004

VIA ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
Room TW-A325
445 12th St., S.W.
Washington, D.C. 20554

RE: Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act; RM-10865

Dear Ms. Dortch:

Please find attached comments of EarthLink, Inc. to be filed in the above-referenced proceeding.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,

John W. Butler
Counsel for EarthLink, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
United States Department of Justice,	)	RM No. 10865
Federal Bureau of Investigation and Drug	)	
Enforcement Administration	)	
	)	
Joint Petition for Rulemaking to Resolve	)	
Various Outstanding Issues Concerning	)	
the Implementation of the Communications	)	
Assistance for Law Enforcement Act	)	

COMMENTS OF EARTHLINK, INC.

John W. Butler
Earl W. Comstock
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-2500

Dave N. Baker
Vice President for Law
and Public Policy
EarthLink, Inc.
1375 Peachtree Street
Atlanta, GA 30309

April 12, 2004

COMMENTS OF EARTHLINK, INC.

EarthLink is one of the nation's largest Internet Service Providers (ISPs), serving over 5 million customers nationwide with dial-up, broadband (DSL, cable and satellite), web hosting and wireless Internet services. EarthLink regularly receives awards for its customer service and innovation, including the J.D. Power and Associates award for highest customer satisfaction among dial-up ISPs and (tie) highest customer satisfaction among broadband ISPs.

EarthLink files these comments in response to the Notice issued by the Commission on March 12, 2004.[1] The Notice requested comment on the joint petition filed on March 10, 2004, by the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively "Law Enforcement").[2] As an ISP, EarthLink could be directly affected by the promulgation of any regulations that the Commission might ultimately adopt in response to the *Joint Petition*. Because of the business that it is in, EarthLink is particularly interested in the treatment of Internet access services, and it is to the proper treatment of those services that EarthLink addresses these initial comments. Although EarthLink provides its perspective on several issues raised by the *Joint Petition*, it focuses primarily on a key legal issue that must be resolved before any of the other issues raised can meaningfully be addressed. It is to that key point that we turn first.

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[1] DA No. 04-700 (March 12, 2004).

[2] United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration, *Joint Petition for Expedited Rulemaking*, RM-10865 (March 10, 2004) (hereinafter "*Joint Petition*").

I. Because the Definitions of "Information Service" in the Communications Act and "Information Services" in CALEA Are Functionally Identical, CALEA Cannot Reach the Transmission Component of Broadband Internet Access Unless the Commission Reverses Its Position that Broadband Internet Access Is Solely an "Information Service."

The *Joint Petition* raises numerous issues with respect to Law Enforcement's continued ability to conduct lawful intercepts of communications under the Communications Assistance for Law Enforcement Act.[3] At the heart of the *Joint Petition*, however, is one key legal question: Where does CALEA draw the line between the "telecommunications carrier" transmission and switching services that are subject to CALEA and the "information services"[4] that are not? Contrary to the suggestion made by Law Enforcement in the *Joint Petition,* the Commission cannot decide where to draw that line by looking solely at the definition of "telecommunications carrier." Any determination by the Commission based only on the statutory construction of "telecommunications carrier" is legally unsupportable because Congress affirmatively excluded from the definition of "telecommunications carrier" any person or entity "insofar as they are engaged in providing information services."[5] Thus, in order to determine whether a person or entity must comply with the assistance requirements of section 103(a) of CALEA,[6] the Commission must first determine to what extent that

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[3] 47 U.S.C. §§ 1001 *et seq.* (hereinafter "CALEA").

[4] *See* 47 U.S.C. § 1001(6) for the definition of "information services" under CALEA.

[5] *See* 47 U.S.C. § 1001(8)(C). *See also* 47 U.S.C. § 1002(b)(2)(A), which explicitly exempts "information services" from the intercept requirements of section 103(a) of CALEA (47 U.S.C. § 1002(a)).

[6] 47 U.S.C. § 1002(a).

person or entity is engaged in providing "information services." The *Joint Petition* is essentially silent on this point.

In resolving the question of what constitutes "information services," the Commission must consider not only the definition of "information services" under CALEA,[7] but it must also consider the definition of "information service" under the Communications Act of 1934.[8] The reason the Commission must look at both definitions is simple: Congress used the same operative language in both.[9] An "information service" under the Communications Act by definition also constitutes "information services" under CALEA.[10] Because this is the case, whatever the Commission might say about the proper scope of the term "telecommunications carrier," there is no interpretation of that term that can result in having CALEA reach the transmission underlying broadband Internet access unless and until the Commission reverses its position that the transmission component of broadband Internet access services offered to the public is not a

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[7] 47 U.S.C. § 1001(6).

[8] 47 U.S.C. § 153(20).

[9] *Compare* 47 U.S.C. 1001(6) ("The term 'information services' (A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...") *with* 47 U.S.C. 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...").

[10] While the Commission has said that CALEA determinations must be based on the CALEA definitions because the Telecommunications Act of 1996 did not modify CALEA, it also said that "we expect in virtually all cases that the definitions in the two Acts will produce the same results...." *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCCR 7105, 7112 (¶ 13) (Aug. 31, 1999) (hereinafter "*CALEA Second Report and Order*"). To the extent that there are differences, the statutory definition of "information services" in CALEA is actually broader than the definition of "information service" under the Communications Act. This is so for two reasons. First, the CALEA definition also explicitly includes "electronic messaging services" that are separately defined in CALEA and are not explicitly referred to in the Communications Act. Second, the exclusion for management, control, or operation of a telecommunications network is narrower in CALEA than in the Communications Act. *Compare* 47 U.S.C. § 1001(4) (electronic messaging service), 47 U.S.C. § 1001(6)(B) (included services), and 47 U.S.C. §1001(6)(C) (excluded services) *with* 47 U.S.C. § 153(20) (Communications Act definition of "information service"). Therefore, at a minimum, the CALEA exemption for "information services" includes any "information service" under the Communications Act.

"telecommunications service," but instead constitutes an inseparable part of an "information service." As of today, because the Commission has either tentatively (with respect to wireline broadband)[11] or finally (with respect to cable modem service) [12] declared the entire bundled offering of "broadband Internet access service" to be an "information service," the transmission component of broadband Internet access is exempt from CALEA under the plain language of the statute. As a result, the problem that Law Enforcement seeks to address in the *Joint Petition* can only be addressed if the Commission reverses its unfounded interpretation and properly recognizes that the broadband transmission component of broadband Internet access service is a "telecommunications service,"[13] not an "information service."

The Ninth Circuit Court of Appeals, in *Brand X Internet Services v. FCC*, [14] vacated the Commission's *Declaratory Ruling* on cable modem services and held that broadband Internet access services offered over cable facilities constitute a bundled offering of legally separate "information service" and common carrier transmission service components. The Ninth Circuit's decision is consistent with the plain language of

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[11] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket 02-33 (Rel. Feb. 15, 2002) (hereinafter "*Wireline Broadband*").

[12] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* Declaratory Ruling, GN Docket No. 00-185 (Rel. March 15, 2002) (hereinafter *"Declaratory Ruling"*).

[13] 47 U.S.C. 153(46) defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

[14] 345 F.3d 1120 (9th Cir. 2003) (petition for en banc rehearing denied; motions for stay of mandate pending filing of certiorari petitions granted).

the Communications Act and the Commission's long-standing precedents.[15] The functionally identical definitions of "information service" under the Communications Act and "information services" under CALEA, coupled with the "information services" exclusion in CALEA, foreclose any possibility that CALEA will reach the transmission component of broadband Internet access unless and until the Commission reverses its decision in its cable modem service *Declaratory Ruling* and its tentative conclusion in the *Wireline Broadband* proceeding. The Commission should indicate its intent to reverse these two decisions immediately by announcing that it will not seek a writ of certiorari with respect to the Ninth Circuit's *Brand X* decision.

II. CALEA Will Not Reach Broadband Transmission Used for Internet Access Service Even Under Law Enforcement's Proposed Expanded Definition of "Telecommunications Carrier" Unless the Commission Revises Its Holding that Broadband Internet Access Service Is Wholly an "Information Service."

Although no meaningful action can be taken on the *Joint Petition* until the point addressed above is decided, in order to provide a complete record EarthLink addresses below some of the details of the *Joint Petition's* discussion of the scope of the definition of "telecommunications carrier" under CALEA.

Recognizing the problems posed by the Commission's unfounded interpretation of the definition of "information service" under the Communications Act, Law Enforcement advances the argument that Internet access service providers qualify as "telecommunications carriers" under

[15] For an extensive discussion of these precedents, see EarthLink's Letter to K. Ferree, November 8, 2001, filed in GN Docket 00-185, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, pp. 2-6, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512774460 (viewed April 12, 2004).

CALEA's supplemental definition under section 102(8)(B)(ii). Clause (ii) provides that the term "telecommunications carrier" includes:

> (ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title; . . . .[16]

It appears that Law Enforcement proffers this alternative approach in response to the Commission's previous ruling (now overturned in *Brand X*) that cable modem service does not contain a "separate" common carrier telecommunications service and the Commission's similar tentative conclusion with respect to DSL-based Internet access service in the *Wireline Broadband* proceeding.[17] That this is the reason that Law Enforcement has included the section 102(8)(B)(ii) argument is illustrated by its statement that:

> As long as an entity is engaged in transmission or switching, the Commission can and should bring that entity within the scope of CALEA <u>even if the entity is not offering a separate telecommunications service to the public as a common carrier</u>, as long as the Commission determines that "such service is a replacement for a substantial portion of the local telephone exchange service" and that extending CALEA coverage "is in the public interest."[18]

The underlined language in the passage quoted above says to EarthLink that Law Enforcement is seeking to achieve its objectives even if the Commission persists in its assertion that the transmission underlying broadband Internet access that is offered to the public for a fee is not a common carrier "telecommunications

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[16] 47 U.S.C. § 1001(8)(B)(ii).

[17] *See, e.g., Declaratory Ruling* at ¶¶ 39-40; *Wireline Broadband* at ¶ 21.

[18] *Joint Petition* at 13 (emphasis added).

service" for the purposes of the Communications Act. In other words, it seems (although it is far from clear) that Law Enforcement is arguing that, because the definitions of the term "telecommunications carrier" are different in the Communications Act and CALEA,[19] the transmission services provided by a "telecommunications carrier" under CALEA could be considered "separate" from the "information services" riding over that transmission even though such transmission services are not "separate" under the Commission's interpretation of the Communications Act from the "information service" applications that they carry.[20] Although EarthLink sympathizes with the frustration that gives rise to this argument, the argument fails for at least two reasons.

Most fundamentally, the argument does nothing to address the point discussed above regarding the functionally identical definitions of "information service" in the Communications Act and in CALEA. One can talk about the definition of "telecommunications carrier" forever, but the exclusion from CALEA coverage is stated in terms of "information services." Since the operative language used by Congress to identify an "information service" under the Communications Act is the same as the operative language Congress used to identify "information services" under CALEA, for so long as the Commission insists that the transmission component of broadband Internet access service is an "information service" under the Communications Act, that transmission will constitute "information services" under CALEA and will therefore be exempt

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[19] *Compare* 47 U.S.C. § 153(44) *with* 47 U.S.C. § 1001(8).

[20] *See Declaratory Ruling* at ¶ 40 (holding that cable modem service does not include a "separate" offering of telecommunications).

from CALEA. This is a far as any court would have to go in refuting any scheme that attempted to treat broadband transmission differently as between the two statutes.

Although no court would ever need to reach the issue, EarthLink notes that the "replacement for a substantial portion of the local telephone exchange service" test in subsection 102(8)(B)(ii) is substantially similar to the test in section 332(c)(3)(A)(ii) of the Communications Act, 47 U.S.C. § 332(c)(3)(A)(ii), which allows states to regulate a commercial mobile service if "such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." The Commission has never found that the section 332(c)[21] standard has been met. Given the relatively higher take rate for commercial mobile services versus broadband Internet access services, and notwithstanding the different geographic areas addressed by the two tests, Law Enforcement is quite correct that the degree of substitution would, at a minimum, have to "be explored more fully in the context of a notice of proposed rulemaking. . . ."[22] The lack of any factual record on this issue also precludes the issuance of any declaratory order that relies on this theory. As EarthLink notes in Section IV of these comments, a declaratory order is in any event precluded by the plain language of section 229(a) of the Communications Act, 47 U.S.C. § 229(a). EarthLink also notes for the record that, as a logical matter, any "switching or transmission" service that met the "substantial replacement" test

[21] 47 U.S.C. § 332(c).

[22] *Joint Petition* at 25.

and that was offered for a fee would by definition have to be offered to enough customers to make it a "common carrier" service under the commonly understood definition of that term.[23]

In sum, there is no circumstance here that warrants resort to CALEA's alternative definition of "telecommunications carrier," and there is nothing in that definition in any event that changes the fundamental problem imposed by the Commission's improper classification of broadband Internet access as solely an information service. Put differently, Law Enforcement might be technically correct when it says that "the Commission can resolve the status of broadband access under CALEA without having to revisit, directly or indirectly, the question whether broadband access providers constitute 'telecommunications carriers' under the narrower definition employed by the Communications Act."[24] The Commission cannot, however, resolve the status of broadband Internet access under CALEA without revisiting the issue of the extent to which broadband Internet access is an "information service" under the Communications Act and under the functionally identical definition of "information services" under CALEA.

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[23] *See National Association of Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use.").

[24] *Joint Petition* at 25 (footnote omitted).

III. CALEA's Legislative History Confirms That Congress Intended CALEA to Cover Common Carrier Transmission Used to Carry Internet Traffic, But It Also Confirms That Congress Did Not Intend for CALEA to Cover ISPs as Such.

As the preceding discussion indicates, EarthLink supports Law Enforcement's bid to clarify that broadband transmission used to support Internet access service is covered by CALEA. EarthLink does not, however, support any attempt to reach that end by further contorting the language of both CALEA and the Communications Act so as to allow the Commission to continue its misguided application of the Communications Act to broadband transmission services. Put differently, if CALEA coverage of broadband transmission is truly a national security priority, and EarthLink agrees that it is, then there is no rational reason why the Commission should require Law Enforcement to settle for legally insupportable, second-hand theories in order to obtain the access that CALEA clearly contemplates.

Given that EarthLink supports what it understands is Law Enforcement's objective (i.e., to bring broadband transmission used to support Internet access services under CALEA), but also given that EarthLink does not support reaching that conclusion through further legal sleight of hand by the Commission, EarthLink must for the record respectfully oppose certain of the assertions that Law Enforcement makes as part of its bid to find a rationale that the Commission finds palatable.

Pursuant to section 103(b)(2)(A) of CALEA,[25] "information services" are not subject to the intercept capabilities set forth in section 103(a) of that Act.[26] Relying on legislative history to which it cites but which it does not quote, Law Enforcement asserts

[25] 47 U.S.C. § 1002(b)(2)(A).

[26] 47 U.S.C. § 1002(a).

that "Congress did not intend the phrase 'information services' in CALEA to include Internet access service or electronic voice services such as broadband telephony services."[27]

Leaving broadband telephony for another day, the fact is that the legislative history of CALEA is unusually clear and consistent in stating that Congress intended to exclude Internet access service from CALEA requirements. In discussing the legislation's exclusions, the House Judiciary Committee said the following:

> The bill is clear that telecommunications services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers (those would include long distance carriage) need not meet any wiretap standards. PBXs are excluded. So are automated teller machine (ATM) networks and other closed networks. Also excluded from coverage are all information services, such as *Internet service providers* or services such as Prodigy or America-On-Line.[28]

This discussion is notable not only for its direct refutation of the precise proposition offered by Law Enforcement, but also for the fact that it explicitly distinguishes between content providers such as America-On-Line on the one hand and Internet service providers on the other hand and then excludes them both. The statement quoted above is not a fluke or an aberration; it is repeated in the *House Report's* section-by-section analysis:

> The definition of telecommunications carrier does not include persons or entities to the extent that they are engaged in providing information services, such as electronic mail providers, on-line services providers, such as Compuserve, Prodigy, America-On-Line or Mead data, or Internet service providers.[29]

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[27] *Joint Petition* at 27.

[28] H.R.Rept. 103-827(I) (Oct. 4., 1994), reprinted at 1994 U.S.C.C.A.N. 3489, 3498 (italics and emphasis added) (hereinafter *"House Report"*).

[29] *Id.* at 3500 (emphasis added).

In addition to being clear about who was included and who was excluded at the time that the legislation was enacted, the *House Report* makes clear that the term "information services" was intended to be flexible enough to encompass technological change. Accordingly, Law Enforcement is demonstrably mistaken when it asserts that "[w]hen Congress enacted CALEA, it thought of information services simply as the basic retrieval of stored data files and certain electronic messaging functions."[30] In contrast to this assertion, which is in no way supported by the *House Report* citation provided by Law Enforcement,[31] the Committee made it clear that the term "information services" was neither limited nor static:

> It is the Committee's intention not to limit the definition of "information services" to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of "information services." By including such software-based electronic messaging services within the definition of information services, they are excluded from compliance with the requirements of the bill.[32]

In addition to the conclusive legislative history that demonstrates that Congress did not intend to include Internet service providers, the United States Court of Appeals for the District of Columbia Circuit, in the same case that Law Enforcement relies upon in footnote 15 of its *Joint Petition*, stated that: "CALEA does not cover 'information services' such as e-mail and internet access." *USTA v. FCC*, 227 F.3d 450, 455 (D.C. Cir. 2000).

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[30] *See Joint Petition* at 27.

[31] *See* 1994 U.S.C.C.A.N at 3498.

[32] *Id.* at 3501.

Besides making it clear that Internet access services were excluded "information services," the *House Report* also looked at such services through the lens of the "telecommunications carrier" definition, and made it clear that such services did not fall within those covered services that "provide a customer or subscriber with the ability to originate, terminate or direct communications:"[33]

> Second, the capability requirements only apply to those services or facilities that enable the subscriber to make, receive or direct calls. They do not apply to information services, such as electronic mail services, or on-line services, such as Compuserve, Prodigy, America-On-Line or Mead Data, or Internet service providers.[34]

The exclusion of Internet access service providers from CALEA obligations does not reflect some oversight or mistake by Congress. Instead, that exclusion is the result of a conscious and practical exercise in line-drawing:

> Thus, a carrier providing a customer with a service or facility that allows the customer to obtain access to a publicly switched network is responsible for complying with the capability requirements. On the other hand, for communications handled by multiple carriers, a carrier that does not originate or terminate the message, but merely interconnects two other carriers, is not subject to the requirements for the interconnection part of its facilities.
>
> While the bill does not require reengineering the Internet, nor does it impose prospectively functional requirements on the Internet, this does not mean that communications carried over the Internet are immune from interception or that the Internet offers a safe haven for illegal activity. Communications carried over the Internet are subject to interception under title III just like other electronic communications. That issue was settled in 1986 with the Electronic Communications Privacy Act. The bill recognizes, however, that law enforcement will most likely intercept communications over the Internet at the same place it intercepts other electronic communications: at the carrier that provides access to the public switched network.[35]

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[33] 47 U.S.C. § 1002(a).

[34] 1994 U.S.C.C.A.N. at 3503 (emphasis added).

[35] *Id.* at 3503-04 (emphasis added).

The legislative intent expressed in this report language was codified in sections 103(a) and 103(b)(2)(B) of CALEA.[36] Section 103(a) provides in relevant part that the intercept capability requirements apply to a telecommunications carrier's "equipment, facilities, or services that provide a customer or subscriber with the capability to originate, terminate, or direct communications. . . ."[37] Section 103(b)(2)(B), in turn, provides that "[t]he requirements of subsection (a) do not apply to . . . equipment, facilities, or services that support the transport or switching of communications for private networks <u>or for the sole purpose of interconnecting telecommunications carriers</u>."[38]

Read together, these sections make it clear that the CALEA requirements with respect to Internet traffic are to be implemented as close to the edges of the network as is operationally feasible. That is, the appropriate intercept point for packet mode Internet traffic is at the first switching facility that the traffic reaches after it leaves the user's premises.[39] In the case of DSL and dial-up services, this typically will be at the first central office of the local exchange carrier that provides the physical connection to the end user's premises. For cable-based communications, this first intercept point typically will be at the Cable Modem

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[36] 47 U.S.C. §§ 1002(a) and 1002(b)(2)(B).

[37] 47 U.S.C. § 1002(a).

[38] 47 U.S.C. § 1002(b)(2)(B) (emphasis added).

[39] EarthLink agrees with the Commission that "CALEA, like the Communications Act, is technology neutral." *CALEA Second Report and Order*, 15 FCCR at 7120 n. 69. As a result, CALEA applies to the packet-mode transmission networks of telecommunications carriers.

Termination System ("CMTS") located at the cable headend. Given the manner in which packet mode transmissions are routed (i.e., that the multiple packets that comprise a single message are disaggregated and routed individually over separate paths through the communications network before being reassembled upon final delivery), it is a functional necessity that packets be intercepted at the first point of interface between the loop serving the end user's location and the larger network. Against this background, the *Joint Petition*'s assertion that intercept capability requirements extend to all "servers and routers"[40] is both unnecessarily broad and statutorily impermissible.

In sum, all available statutory and legislative materials point to the conclusion that Congress did not intend for CALEA to cover ISPs as such. Thus, to the extent that the *Joint Petition* can be read as an attempt to sweep ISPs lock, stock, and barrel into the definition of "telecommunications carrier" under CALEA, EarthLink objects to that approach as being as untenable as the Commission's attempt to sweep "broadband Internet access service" (including its underlying common carrier transmission) wholly and solely within the definition of "information service."

IV. The Commission Is Statutorily Prohibited From Issuing the Declaratory Order Requested by Law Enforcement.

Section 229(a) of the Communications Act, 47 U.S.C. § 229(a), states "[t]he Commission shall prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act." By using this language, Congress specified a single method – rulemaking – for implementing CALEA

[40] *Joint Petition* at 12.

requirements. The language of the statute prohibits the Commission from utilizing the requested declaratory ruling procedure (or indeed any adjudicatory process) for the purpose of promulgating CALEA rules of general applicability.

Because Congress requires rulemaking in this situation, the general rule that agencies are free to choose either a rulemaking or an adjudication, *see SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947), does not apply. *See National Small Shipments Traffic Conf., Inc. v. ICC*, 725 F.2d 1447 (D.C. Cir. 1984) (agency option to choose only exists "absent specific statutory instruction."). In *Davis v. EPA*, 348 F.3d 772,785 (9th Cir. 2003), the court noted that:

> Absent express congressional direction to the contrary, agencies are free to choose their procedural mode of administration. . . . It is clear that Congress knew how to impose rulemaking requirements under the Clean Air Act when it wanted to do so. *See, e.g.*, 42 U.S.C. § 7545(a) ("The Administrator may by regulation designate any fuel or fuel additive. . .").

The Communications Act's "prescribe such rules," like the Clean Air Act's "by regulation designate," is an example of Congress affirmatively imposing rulemaking requirements.

There is no credible argument that the declaratory order proceeding requested here is a statutorily compliant rulemaking proceeding rather than an adjudication. Section 554 of the Administrative Procedure Act (the "APA"), which governs adjudications, notes that a declaratory order may be issued "to terminate a controversy or remove uncertainty." *See* 5 U.S.C. § 554(e). Such an option is not available in a rulemaking procedure. *See* 5 U.S.C. § 553. Furthermore, the APA defines "order," including a declaratory order, as "a final

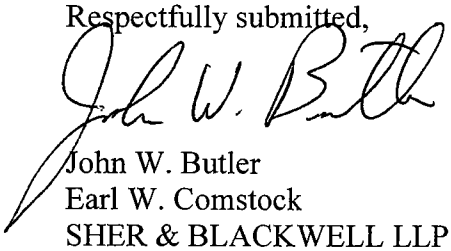
disposition...in a matter *other than rule making....*" *See* 5 U.S.C. § 551(6) (emphasis added). "Adjudication," meanwhile, is defined as an "agency process for the formulation of an order." *See* 5 U.S.C. § 551(7). Thus, a declaratory order proceeding does not comply with the Communication Act's requirement for rulemaking. Accordingly, to accomplish its objectives, the Commission must initiate a rulemaking procedure by publishing notice thereof in the *Federal Register*. *See* 5 U.S.C. § 553(b). The Public Notice dated March 12, 2004, in addition to providing no indication of what action the Commission might intend to take, was not published in the *Federal Register* and therefore cannot be considered notice of a proposed rulemaking.

V. Conclusion.

For the reasons set forth above, EarthLink respectfully requests the Commission to: (1) adopt the reasoning and holding of the Ninth Circuit's decision in *Brand X Internet Services v. FCC,* (2) publish in the *Federal Register* a notice of proposed rulemaking that is premised on the concept that providers of broadband transmission services used to offer Internet access to the public are "telecommunications carriers" under both CALEA and the Communications Act, and (3) deny the *Joint Petition*'s request for a declaratory order as being

statutorily impermissible and unsupported by record evidence.

Respectfully submitted,



John W. Butler
Earl W. Comstock
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-2500

Dave N. Baker
Vice President for Law
and Public Policy
EarthLink, Inc.
1375 Peachtree Street
Atlanta, GA 30309

April 12. 2004