

April 27, 2015

Via ECFS and Email

Christopher Killion
Chief, Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: EarthLink, Inc. v. SBC Communications Inc. and SBC Advanced Solutions, Inc. File No. EB-04-MD-006, EB Docket No. 14-207

Dear Mr. Killion,

EarthLink, Inc. (“EarthLink”)¹ respectfully requests that the Enforcement Bureau take immediate action to resolve a Section 208 complaint that has been pending for more than a decade.

On May 13, 2004, EarthLink brought a complaint against SBC Communications Inc. and SBC Advanced Solutions, Inc. (together “SBC”) pursuant to Section 208 of the Communications Act of 1934, as amended (the “Communications Act”), 47 U.S.C. § 208, and Section 1.720 of the Federal Communications Commission’s (“FCC” or “Commission”) rules, 47 C.F.R. § 1.720.² The Complaint alleged that SBC’s practices regarding its wholesale asynchronous digital subscriber line service violated Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201, 202, Commission rules, 64.901(a) and (b), 47 C.F.R. § 64.901, and *Computer III* precedent.³

EarthLink attempted to address the violations directly with SBC prior to filing the Complaint, but its attempts were unsuccessful.⁴ EarthLink therefore initiated the statutorily-provided complaint process intended to provide entities like EarthLink a forum to resolve disputes.⁵

¹ EarthLink, Inc. is now part of EarthLink Holdings Corp.

² See *EarthLink, Inc. v. SBC Commc’ns Inc. and SBC Advanced Solutions, Inc.*, File No. EB-04-MD-006, Complaint (filed May 13, 2004) (“Complaint” or “EarthLink Complaint”). The Enforcement Bureau used May 17, 2004 as the initial date for scheduling purposes. See *EarthLink, Inc. v. SBC Commc’ns Inc. and SBC Advanced Solutions, Inc.*, File No. EB-04-MD-006, Notice of Formal Complaint, at 2 n.1 (May 21, 2004).

³ Complaint at 9-15.

⁴ *Id.*

⁵ 47 U.S.C. § 208(a) (“Any person. . . complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said

EarthLink followed the prescribed formal complaint rules. It submitted detailed factual allegations, sworn declarations, and extensive legal briefings; gathered and interviewed witnesses to obtain and understand all relevant knowledge of the dispute; and undertook extensive document review to prepare all relevant documents to support EarthLink's complaint.⁶ EarthLink also engaged outside consultants who performed a detailed cost study and analysis to further support the alleged violations and to demonstrate the harm to EarthLink.

The Enforcement Bureau conducted an extensive and lengthy investigation upon receiving the Complaint. It directed parties to appear at a status conference, and ordered additional discovery (including written interrogatories and additional documents) and further briefing from both parties. Both parties filed initial briefs on December 10, 2004 and responsive briefs on January 7, 2005.⁷

EarthLink demonstrated that SBC's conduct violated Commission orders, rules, and precedent. EarthLink proved that this conduct caused EarthLink to suffer significant harm. EarthLink substantiated that the harm was real and quantifiable as both a loss of existing customers and as a decrease in growth of the EarthLink broadband Internet access service in SBC's territory.

EarthLink reasonably anticipated that relief from SBC's illegal conduct would be forthcoming at the conclusion of the investigation, or, at a minimum, a decision explaining why the requested relief would not be granted. EarthLink recognized that it would take time for the Enforcement Bureau to consider the extensive materials submitted in the case before issuing its decision. But EarthLink could not have anticipated that it would have to wait more than a decade for a ruling.

The delay has been extraordinary. EarthLink's Complaint stands easily as the longest pending complaint in the Commission's history.⁸ It has been *eleven years* since the EarthLink Complaint was filed and more than ten years since briefing was concluded. Yet, a decision was

Commission by petition. . . ."). *See also Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Notice of Proposed Rulemaking, 11 FCC Rcd. 20,823, ¶ 16).

⁶ 47 C.F.R. § 1.721.

⁷ *See EarthLink, Inc. v. SBC Commc'ns Inc. and SBC Advanced Solutions, Inc.*, File No. EB-04-MD-006, Brief of EarthLink, Inc. (Dec. 10, 2004); *EarthLink, Inc. v. SBC Commc'ns Inc. and SBC Advanced Solutions, Inc.*, File No. EB-04-MD-006, Defendants' Opening Brief on the Merits (Dec. 10, 2002); *EarthLink, Inc. v. SBC Commc'ns Inc. and SBC Advanced Solutions, Inc.*, File No. EB-04-MD-006, Responsive Brief of EarthLink, Inc. (Jan. 7, 2005); *EarthLink, Inc. v. SBC Commc'ns Inc. and SBC Advanced Solutions, Inc.*, File No. EB-04-MD-006, Defendants' Response Brief on the Merits (Jan. 7, 2005).

⁸ *See, e.g.*, EB – Market Disputes Resolution Division Pending Complaints, <http://www.fcc.gov/encyclopedia/eb-pending-formal-and-pole-action-complaints> (last visited Apr. 22, 2015); EB – Market Disputes Resolution Division Released Items Concerning Formal Complaints, <http://transition.fcc.gov/eb/mdrd/AllItems.html> (last visited Apr. 22, 2015).

never rendered and EarthLink has been given no explanation to justify the delay. The courts have ordered the Commission to act on matters that were pending for significantly less time.⁹

Moreover, EarthLink expended *significant* time and *substantial* resources preparing for and substantiating the Complaint, and SBC undoubtedly shouldered a not insignificant amount of resources defending itself. It would have been irrational for EarthLink to expend these resources had it known the Enforcement Bureau would never issue a ruling. Indeed, if EarthLink had suspected that a decision would take over a decade it would have seriously weighed whether filing a Section 208 complaint was an exercise of good business judgment or a waste of vital company resources.¹⁰

Accordingly, we respectfully request that the Enforcement Bureau, acting on the authority delegated to it by the Commission, immediately issue a decision granting the relief EarthLink requested in the Complaint.

Sincerely,

A handwritten signature in blue ink, appearing to read "J Bagg".

Christopher J. Wright
Jennifer P. Bagg
Mark D. Davis
Counsel for EarthLink, Inc.

⁹ See, e.g., *In re Core Commc'ns, Inc.*, 531 F.3d 849, 857 (D.C. Cir. 2008) (finding the FCC's six-year delay unreasonable). See also *MCI Telecomm. Corp. v. F.C.C.*, 627 F.2d 322, 325 (D.C. Cir. 1980) (finding the FCC's four-year delay unreasonable); *Nader v. F.C.C.*, 520 F.2d 182, 206 (D.C. Cir. 1975) ("nine years should be enough time for any agency to decide almost any issue. There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all - and the result is a denial of justice.") (internal quotations omitted).

¹⁰ Likewise, other parties who have considered filing a formal complaint subsequent to EarthLink's Complaint have had to consider, based on the treatment of EarthLink's Complaint, the prudence of filing given the possibility of extreme delay or the risk that they might never receive a decision at all. The delay therefore has harmed other parties who have likely been deterred away from the formal complaint process due to the fear that the Enforcement Bureau would ignore their allegations as it has ignored EarthLink's Complaint.

CERTIFICATE OF SERVICE

I certify that on April 27, 2015, I served a copy of the foregoing letter on the parties identified below by means of electronic mail.

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