

June 19, 2015

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:

On behalf of EarthLink, LLC, (“EarthLink”) I write to respond to the June 10, 2015, letter filed by AT&T Services Inc. (“AT&T”) in the above referenced proceeding.¹ AT&T asserts that EarthLink “abandoned the complaint,” and that the Federal Communications Commission (“Commission”) should dismiss the case for “failure to prosecute.”² These assertions are factually wrong and legally meritless.

As a factual matter, EarthLink prosecuted its claims diligently from the time it filed the complaint in 2004 to the completion of its case. As AT&T concedes, “the matter was fully briefed by early 2005.”³ As a legal matter, there was nothing left for EarthLink to do after full briefing of the case. The next—and only—remaining step in the complaint process was resolution. Far from abandoning its efforts, EarthLink took the *only* action permitted by the Commission’s *ex parte* rules in a restricted proceeding: making status and timing inquiries.

AT&T’s request to dismiss this case for “failure to prosecute” is therefore meritless. As EarthLink explained, there were no additional legal paths available to further prosecute its complaint, and attempts to make additional filings in this restricted proceeding would have likely led to even more delay. In any event, dismissal for failure to prosecute is a “drastic” remedy warranted only if there is a “pattern of dilatory, disruptive, or recalcitrant conduct so sharply out of order as to absolutely compel dismissal.” *See Innovative Women's Media Ass’n v. FCC*, 16 F.3d 1287, 1289 (D.C. Cir. 1994) (reversing dismissal for failure to prosecute as arbitrary and capricious). AT&T has not identified even a single missed deadline—much less a pattern of dilatory conduct. In a case such as this one, where EarthLink diligently prosecuted its claims and

¹ Letter from Aaron M. Panner, Counsel, AT&T Services Inc., to Christopher Killion, Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, File No. EB-04-MD-006, EB Docket No. 14-207 (filed June 10, 2015).

² *Id.* at 1.

³ *Id.*

Christopher Killion

June 19, 2015

Page 2 of 2

has been waiting for more than a decade for the Commission to render a decision, it would be reversible error to dismiss the case for failure to prosecute. *Id.* at 1291.

AT&T is simply wrong to say that “EarthLink admits that it allowed its complaint to remain pending even though it had no good faith basis for at least part of the relief sought.”⁴ AT&T’s liability is determined by the regulations in place at the time the complaint was filed; subsequent regulatory changes are inapposite to the resolution of the merits of the complaint. For example, the Commission’s decision subsequent to the date of the complaint that relieved AT&T of its obligation to file a CEI plan has no bearing on whether then-SBC is liable for its prior practices regarding its wholesale asynchronous digital subscriber line service that violated the Communications Act and the Commission’s rules and precedent.

Since the time that EarthLink filed its complaint, the Commission has reduced the regulatory obligations of retail broadband Internet access service; opened and concluded no less than three proceedings that imposed new regulatory obligations on retail broadband Internet access services; and defended two of those actions on appellate review (and is currently defending a third action). This speaks to the extraordinary—and unjustified—delay that EarthLink has faced, not to any wrongdoing on the part of EarthLink. It most certainly does not provide any justification for dismissing the complaint.

Lest its “effort to revive this litigation” remains “obscure,”⁵ EarthLink responded to an invitation by the Commission to restate EarthLink’s desire for resolution in this proceeding. As EarthLink has explained, it expended *significant time and substantial resources* preparing for and substantiating the complaint and, as a result of then-SBC’s actions, suffered real and quantifiable harm from a loss of existing customers and a decrease in growth of the EarthLink broadband Internet access service in SBC’s territory. After over a decade of inaction, EarthLink seeks simply and finally for the Commission to render a decision. Accordingly, EarthLink reiterates its request for resolution of its 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, LLC

⁴ *Id.*

⁵ *Id.*

CERTIFICATE OF SERVICE

I certify that on June 19, 2015, I served a copy of the foregoing letter on the parties identified below by means of electronic mail.

Michael K. Kellogg
Aaron M. Panner
Evan T. Leo
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C
1615 M Street, N.W., Suite 400
Washington, DC 20036
mkellogg@khhte.com
apanner@khhte.com
aleo@khhte.com



Jennifer P. Bagg