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VIA ELECTRONIC FILING

December 24, 2002

EX PARTE

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Oral *Ex Parte* Presentation
CC Docket No. 01-337

Dear Ms. Dortch:

On December 23, 2002, the undersigned met with Daniel Gonzalez, Senior Legal Advisor to Commissioner Martin to discuss that the Commission should deny the SBC forbearance petition of October 3, 2001.

In the meetings, EarthLink reiterated several points it made in previously filed comments and reply comments in the above-referenced docket, as well as some of the points explained in the attached bullet-sheet provided at the meeting. EarthLink noted that the petition does not meet the Section 10 standards of forbearance. Applying the Section 10 standards to the SBC's Petition, it is clear that consumers in many communities do not even have a choice of two platforms. EarthLink noted, for example, the California PUC's reply comments in CC Dkt. 01-337, showing that 35% of Californians live in communities where DSL is the only broadband platform available. The evidence presented in the SBC Petition fails to address consumers in communities that would face an unregulated monopoly provider. EarthLink noted, however, that once there is sufficient competition and choice across several platforms then regulatory oversight may not be necessary, but the FCC has not yet determined how to evaluate the degree of sufficient competition; the FCC surely cannot determine these tests and issues and then apply them to the SBC Petition. Further, if the FCC cannot be assured of SBC's compliance with its recent "voluntary commitments" connected to the Petition, the FCC should find that the Petition is deficient.

EarthLink discussed that a finding of nondominance would be wholly inappropriate and unnecessary given that Section 10 forbearance does not require such an analysis. EarthLink also discussed with Mr. Gonzales whether SBC or the BOCs should be deemed nondominant in either the retail Internet access market or the wholesale DSL market. In EarthLink's view, since the BOCs' retail ISP services are not regulated by the FCC, the state of the retail market may not require resolution for the FCC to address issues of dominance/nondominance. EarthLink also pointed out that, unlike long distance services at the time of the FCC's reclassification of AT&T to nondominant, broadband consumers today do not have the ability to switch between one broadband platform or another due to high transactions costs, long term contracts, and installation processes.

It is important, however, for the FCC to issue a decision on the SBC Petition, even if the FCC decides to provide some regulatory relief such as detariffing. Lack of an order, and forbearance by operation of law, would be a worse outcome that would lead to significant uncertainty. Finally, should the FCC grant some regulatory relief, EarthLink noted that it is also important for the order to articulate the processes and steps that would follow to avoid uncertainty in implementation of the order.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, ten copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceeding. Should you have any questions, please contact the undersigned.

Sincerely,

/s/

Mark J. O'Connor
Counsel for EarthLink, Inc.

CC: Daniel Gonzalez (via email)

SBC Advanced Services Forbearance Petition

- Statutory principles prohibiting access on discriminatory terms and requiring public accessibility to telecommunications services should continue to apply to SBC advanced services.

- *SBC Petition* Fails to Meet Section 10 Forbearance Standard

  - Petition fails under "public interest" standard of §§ 10(a)(3) and 10(b). Under Section 10(b), issue is whether forbearance would "enhance competition among providers of telecommunications service" in determining "public interest." Since FCC's position is that cable modem service is not a "telecommunications service," forbearance would not enhance competition among telecom service providers. Thus, while cable market share data is irrelevant to forbearance analysis, *SBC Petition* offered no other evidence to support forbearance.
  - Regulation is "necessary for the protection of consumers," § 10(a)(2), because (1) consumers obtain enormous value from ISP choice, (2) many consumers have no other open platform to choose unaffiliated ISP, (3) cross-platform switching by consumer is difficult, at best. Dominant carrier regulations keep discriminatory conduct against unaffiliated ISPs in check better than less or no regulation.

- SBC November 15 and 26 *ex parte* letters move in positive direction but raise serious issues requiring clarification:
  - What is enforcement of SBC's "voluntary commitments"? Likewise, what are remedies for ISPs if "voluntary commitments" are violated?
  - What is SBC's "voluntary commitment" not to discriminate, in light of fact that Sections 201 and 202 of the Act continue to apply regardless of forbearance action (*see CPE Unbundling Order,* ¶ 46)?
  - Web-posting vs. tariff filings may be acceptable, so long as transparency and nondiscrimination remains.
  - Transparency of rates, terms and conditions and swift FCC enforcement should be made clear.

- FCC should require SBC to maintain multi-year tariff arrangements regardless of detariffing or deregulation. Detariffing should not be used as vehicle to end service, renegotiate arrangements, upset customer expectations and cause consumer dislocation.