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 **Lampert & O'Connor, P.C.**
1750 K Street NW
Suite 600
Washington, DC 20006

ORIGINAL

Kenneth R. Boley
boley@l-olaw.com

RECEIVED

Tel 202/887-6230
Fax 202/887-6231

VIA HAND DELIVERY

March 19, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

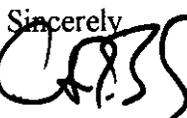
Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Written *Ex Parte* Presentation
CC Docket Nos. 02-33, 98-10, 95-20, 01-337

Dear Ms. Dortch:

On March **18**, 2003, the attached letter was delivered to Carol Matthey, Jane Jackson, Brent Olsen, Cathy Carpino, Terri Natoli, William Kehoe, and Michael Carowitz, all of the Wireline Competition Bureau, as well as Harry Wingo of the Office of General Counsel. The purpose of the letter is to rebut a point made by SBC in its March **6**, 2003 *ex parte* presentation to these members of the FCC staff.

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

Sincerely


Kenneth R. Boley
Counsel for EarthLink, Inc

CC: Michael Carowitz
Cathy Carpino
Jane Jackson
William Kehoe
Carol Matthey
Terri Natoli
Brent Olsen
Harry Wingo

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FEDERAL COMMUNICATIONS COMMISSION
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Ms. Carol Matthey
Deputy Chief, Wireline Competition Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation
CC Docket Nos. 02-33, 98-10, 95-20; 01-337

Dear Ms. Matthey:

On March 6, 2003, representatives of SBC made an oral *ex parte* presentation to you and other FCC staff in which they argued that the wholesale DSL service SBC provides to Internet Service Providers (“ISPs”) should no longer be subject to Title II of the Communications Act. On behalf of EarthLink, Inc. (“EarthLink”), we write to rebut one specific argument in SBC’s presentation. EarthLink has addressed SBC’s other points in earlier filings in this proceeding.

On page three of its presentation, SBC draws a distinction between ISPs and Application Service Providers (“ASPs”), suggesting that as long as consumers have unfettered access to ASPs, consumer welfare does not require that there be more than one ISP per broadband platform. SBC states, “Consumer welfare issues are independent of whether multiple ISPs are serving end-users over the same broadband platform.”¹

EarthLink has long argued that if the Commission determines that wholesale DSL transmission provided to unaffiliated ISPs is not a telecommunications service and is not regulated under Title II of the Act, then ILECs would discriminate against independent ISPs in favor of their own affiliated ISPs, thus putting independent ISPs at a severe competitive disadvantage. The result would be that only one ISP—the one affiliated with the ILEC—would be able to provide DSL-based Internet access services to consumers, and the elimination of ISP choices would harm consumer welfare.’

¹ Letter from Jeffrey Brueggeman to Marlene H. Dortch, “Notice of Ex Parte,” at 3 (March 7, 2003) (“SBC *ex parte*”).

² *See, e.g.* Comments of EarthLink, Inc., CC Dkts. 02-33, 98-10, 95-20, at 16-22 (May 3, 2002); Reply Comments of EarthLink, Inc., CC Dkts. 02-33, 98-10, 95-20, at 20-22 (July 1, 2002) (footnote continued on next page)

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By arguing that consumer welfare is independent of whether multiple ISPs are serving end-users over the same broadband platform, SBC addresses the possibility that if it were freed of Title II access requirements today, it would discriminate against competing ISPs in the provision of DSL. SBC even recognizes that vibrant competition among ISPs offers consumer “benefits,” but maintains that “[m]andatory ISP access is not necessary to provide consumer benefits of ISP or ASP diversity.”³ In other words, it is SBC’s view that American consumers in its region would be well enough off with only one ISP—the SBC-affiliate—offering DSL-based Internet access service. SBC further suggests that even if the FCC *did* consider such a development to be a “market failure,” there is currently “[n]o evidence of market failure necessitating intervention,” and that even in the event of such a failure, the “[c]osts of regulation would outweigh benefits to consumers.”⁴

EarthLink urges the Commission to reject SBC’s approach. Contrary to SBC’s presentation, current regulation prohibits SBC from discriminating in the provision of wholesale DSL transmission service. It would not be appropriate for the Commission to change that regulation, triggering “market failure” borne of an absence of broadband competition. As EarthLink has stated before, those arguing for deregulation of wholesale DSL have failed to describe with any specificity how, as SBC puts it, the “[c]osts of regulation ... outweigh benefits to consumers.”⁶

At the core of SBC’s theory is the unsupportable contention that ISP diversity is of only marginal consumer benefit. When consumers go shopping for Internet access, they are confronted with a wide variety of options from competing ISPs, and they select the package that best meets their particular needs. First and foremost, there are price differences. Variations in the level of customer service also distinguish ISPs, as do policies for the protection of consumers’ privacy, and portability features. Prospectively, independent ISPs will continue to innovate and present new, useful, and desirable features to distinguish themselves in the marketplace, including offerings that may conflict with an ILEC’s established interests and thus would be certain not to emanate from an ILEC-affiliated ISP. In fact, independent ISPs were early adopters of DSL-based high-speed data services over copper loops ILECs made available for alarm service, and when it became apparent that DSL threatened to cut into ILECs’ T1 business, some ILECs

(footnote continued from previous page)

(“EarthLink Reply”); Comments of EarthLink, Inc., CC Dkts. 98-10, 95-20, at 5-6 (April 16, 2001).

³ SBC *ex parte* at 3

⁴ *Id.*

⁵ EarthLink Reply at 11-17

⁶ SBC *ex parte* at 3

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attempted to withdraw the alarm loop offerings⁷ It is true that some ISPs, EarthLink included, offer content, but ISPs offer much, much more than content or simple connections to the Internet And the more broadband ISPs there are competing for retail subscribers, the greater those choices will be, to the great benefit of consumers SBC's approach would sacrifice these benefits, requiring consumers in its territory to accept the price, customer service, and other details of its affiliated ISP service, if they want DSL service at all Notably, on page seven of its presentation, SBC fails to include in its cost-benefit analysis of DSL deregulation the loss to consumer welfare of decreased participation in the retail broadband ISP market⁸

Over the upcoming months, we hope to be in touch with you further on this and other issues raised in this Wireline Broadband proceeding In the meantime, please do not hesitate to call with any questions or comments Thank you for your consideration in this matter

In accordance with the Commission's *exparte* rules, an original and eight copies of this letter have been provided to the Commission Secretary for inclusion in the above-referenced dockets

Mark J. O'Connor
Kenneth R. Boyle
Counsel to EarthLink, Inc

cc: Michael Carowitz Terri Natoli
Cathy Carpino Brent Olsen
Jane Jackson Harry Wingo
William Kehoe

Attachment

⁷ See *Recommended Decision of Administrative Law Judge Ken F. Kirkpatrick Permanently Suspending Tariff Sheets Filed Under Advice Letter No. 2663*, Public Utilities Commission of the State of Colorado, Docket No. 97K-342T (January 9, 1998) (noting that local area data service ("LADS") loops were being used for DSL, and rejecting U.S. West's petition to discontinue LADS service because, there was no reasonable substitute capable of the same functions, including U.S. West T1 lines which were priced significantly higher than LADS) (*found at*, www.panix.com/~oppendahl/lads/r9816.sht).

⁸ SBC *exparte* at 7.