

Kenneth R. Boley
boleyn@bolaw.com

RECEIVED

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

VIA HAND DELIVERY--DRAFT

MAR 26 2003

March 26, 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

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

Re Notice of Oral *Ex Parte* Presentations
CC Docket Nos. 01-337; 02-33; 98-10, 95-20

Dear Ms. Dortch

On March 25, 2003, Dave Raker, Vice President for Law and Public Policy, EarthLink, Inc , and Mark O'Connor of Lampert & O'Connor, P C , met with Matthew Brill, Senior Legal Advisor to Commissioner Abernathy. During the meeting, EarthLink discussed its positions previously filed in the above-referenced dockets. The parties also discussed EarthLink's *ex parte* letter filed in the above-referenced proceedings on March 24, 2003, which explains the legal obstacles to the Commission using "regulatory parity" as a basis for decision in the *Wireline Broadband* proceeding. EarthLink explained that regulatory parity is not a substitute for public interest considerations. Ensuring continued ISP access to BOC networks would be entirely reasonable and would promote greater consumer welfare.

Maintaining *Computer III* access principles on BOCs would be reasonable because ISPs generally do not have access to the cable platform. ISPs (including EarthLink) substantially rely on BOC DSL services to deliver competitive broadband ISP services to consumers. Although BOCs trail cable in broadband market share, much of this is attributable to BOCs' prior business decisions to promote other broadband services instead of DSL. While EarthLink has suggested ways to streamline *Computer III* requirements, the marketplace for competitive sources of broadband transport is not yet sufficiently developed to substantially reduce or eliminate *Computer II* and *Computer III* non-discriminatory access requirements.

EarthLink also explained how ISPs provide price competition and a range of competitive services that benefit consumers: as well as how consumer access to web content is best ensured through rules which ensure continued DSL access for ISPs EarthLink also questioned whether, in light of recent decisions, there is a compelling basis for BOC regulatory relief in the *Wireline*

■ Lampert & O'Connor, P.C.

Oral *Ex Parte* Notice – March 26, 2003

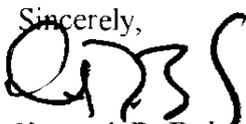
Page 2

Broadband proceeding

On the same day, the undersigned met with Jessica Rosenworcel, Legal Advisor to Commissioner Cops, to discuss EarthLink's position in the *Wireline Broadband* proceeding. The parties discussed the EarthLink *ex parte* letter tiled March 24, 2003, explaining the legal obstacles to the Commission using "regulatory parity" as a basis for decision in this proceeding. In response to a question, EarthLink explained its concerns that wholesale DSL services were overpriced and referenced its October 2, 2002 *ex parte* in the proceeding dealing with Verizon's now-withdrawn Transmittal No 232 That document was also filed for the record in this proceeding (CC Dkt. 02-33) as an attachment to EarthLink's October 28, 2002 *ex parte* notice EarthLink also discussed and provided a copy of its March 19, 2003 *ex parte* letter in this proceeding (CC Dkt. 02-33) rebutting SBC's argument that the realization of consumer benefits is independent of whether there is competition among DSL-based ISPs.

On the same day, Dave Baker and the undersigned met with Christopher Libentelli, Legal Advisor to Chairman Powell, to discuss the *Wireline Broadband* proceeding. The parties discussed the EarthLink *ex parte* letter tiled March 24, 2003, explaining the legal obstacles to the Commission using "regulatory parity" as a basis for decision in this proceeding. EarthLink also discussed and provided a copy of its March 19, 2003 *ex parte* letter rebutting SBC's argument that the realization of consumer benefits is independent of whether there is competition among DSL-based ISPs EarthLink provided a copy of the attached document entitled "Recent Awards " Finally, the parties discussed the potential implications of a decision to attempt to regulate wholesale DSL service provided to independent ISPs under Title I of the Communications Act, including the possible curtailment of competition in the provision of broadband Internet access services.

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 Matthew Brill
Jessica Rosenworcel
Christopher Libenelli

RECENT AWARDS

EarthLink®



August 2002

2002 Highest in Customer Satisfaction Among High-Speed Internet Service Providers in a Tie and Highest in Customer Satisfaction Among Dial-Up Internet Service Providers - J.D. Power and Associates — EarthLink has received the Highest Ranking in Customer Satisfaction Among Dial-up ISPs and tied in the ranking for Highest Customer Satisfaction Among High-Speed ISPs, according to J.D. Power and Associates 2002 *Syndicated Internet Service Provider Residential Customer Satisfaction Study*™.

"We are proud to have garnered these rankings in such a prestigious and customer-focused study," said Karen Gough, EarthLink's executive vice president of marketing. "J.D. Power and Associates has always defined the standard for excellence, and these rankings once again demonstrate our commitment to providing the very best Internet experience to our subscribers."

J.D. Power and Associates 2002 *Syndicated Internet Service Provider Residential Customer Satisfaction Study*™. Study conducted among national and regional ISPs and based on 4,629 responses. www.jdpower.com



CNET.com
The source for computers
and technology.

April 2002

2002 CNET Editors' Choice Award — Citing EarthLink's (Nasdaq: ELNK) "cool tools and reliability," CNET for the third consecutive year has awarded top honors to EarthLink in its annual review of Internet service providers (ISP).

In an article titled *Dialing for dollars: we compare five major dial-up ISPs*, CNET writes, "EarthLink gets our nod as the best among the major dial-up ISPs. Why? The service helps you get started, then steps nimbly out of the way. It offers earl-to-use tools and doesn't pester you with ads or spam. And, to top it off, EarthLink provides highly reliable service and surprisingly good support for a reasonable \$22 a month."



March 2002

2002 Ziff Davis Smart Business "Five-Star Award" — EarthLink has received the only five star rating among Internet service providers (ISP) from the editors of *Ziff Davis Smart Business*. The magazine selected the Atlanta-based ISP as its "top pick," citing EarthLink's easy installation, abundance of local-access dial-up numbers and array of broadband choices, including cable, DSL and satellite high-speed access. In a review titled *Deathmatch: Internet Service Providers*, Gordon Basr writes, "The Net, the way you want it...Remarkably simple to install," and "Fastest time for a 1MB download with a 56Kbps connection."

Ziff Davis Smart Business 5-Star Award Logo is a trademark of Ziff Davis Publishing Holdings Inc.



October 2001
&
February 2000

2001 Mobile Computing's "First Class Award" — They write, "Once again, our First Class Award goes to EarthLink, but not just for providing a fast and reliable connection to the Internet without pop-up ads. This international ISP has rounded out its offerings by adding two pricing plans ... and more important, by supporting a wide variety of wireless-access devices."

MOO Mobile Computing's Best ISP Award — Both EarthLink and MindSpring were named best Internet service provider in Mobile Computing's editorial review. "Based on these factors [ability to connect to the Internet in a variety of ways and the time it took to connect], two companies which are soon to be one, came out on top."



June 4, 2001

2001 Inter@ctive Week's "Top Internet Service Provider" Award — For the second year in a row, EarthLink was honored with another award from Inter@ctive Week. This year, IT managers rated EarthLink the "Top Internet Service Provider" in a survey. "No Internet service provider is more deserving of a top spot in the ISP category than EarthLink ... Number one fights hard to become a real alternative to America Online."



March 2001

2001 Ziff Davis Smart Business' "Brsr of the Brsr" Award — Formerly *PC Computing*, *Ziff Davis Smart Business Magazine* awarded EarthLink its second straight MVP award for best ISP while EarthLink Biz was named a Web Hosting finalist. The magazine writes "[EarthLink] ... comes in first place for easy access to the Net from just about anywhere in the 50 states ... What else could you want?"