

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

Mark J. O'Connor  
oconnor@l-olaw.com

**ORIGINAL**

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

**RECEIVED**

**MAY 12 2003**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA HAND DELIVERY**

May 12, 2003

**EX PARTE**

Marlene Dortch  
Secretary  
Federal Communications Commission  
The Portals  
TW-A325  
445 12<sup>th</sup> 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:

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, attached please find the original and eight copies of an *ex parte* letter for inclusion in the public record in the above-captioned proceedings.

Should you have any questions, please contact me.

Sincerely,

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

 **Lampert & O'Connor, P.C.**

1750 K Street NW  
Suite 600  
Washington, DC 20006

RECEIVED

MAY 12 2003

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

Mark J. O'Connor  
oconnor@l-o-law.com

VIA HAND DELIVERY

May 12, 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

EX PARTE

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

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

Dear Ms. Dortch:

In this letter, EarthLink, Inc. ("EarthLink") addresses two issues raised in the above-referenced proceeding related to the costs and benefits of Open Network Architecture ("ONA") and Comparably Efficient Interconnection ("CEI"). First, on the benefits side of the scale, reports filed by the Bell Operating Companies ("BOCs") reveal that ONA, especially its "new services" aspects, provide significant benefits to Internet service provider ("ISP") competition and thus the consumer public. These reports run strongly counter to BOC suggestions in this rulemaking proceeding that ONA is neither useful nor used by ISPs.<sup>1</sup> With regard to the costs of compliance with CEI and ONA, EarthLink addresses recent filings from BellSouth and Qwest alleging that CEI and ONA are expensive and counterproductive measures. As described in the second part of this letter, these claims are vague and unsupported by evidence. Indeed, what costs the BOCs do specify are not properly classified as the true costs of continued regulatory compliance with *Computer Inquiry* obligations.

---

<sup>1</sup> See e.g., Reply Comments of Qwest, at 29 (filed July 1, 2002) (characterizing the *Computer III* obligations as "totally ineffectual" applied to broadband); Reply Comments of Verizon at 50 (July 1, 2002) ("the *Computer II/III* rules have outlived their usefulness even in the narrowband world for which they were designed"); Comments of SBC Communications, Inc. at 24 (filed May 3, 2002) ("The *Computer Inquiry* requirements are not simply harmless historical artifacts as extended to broadband; they affirmatively impede competition and investment"); Reply Comments of BellSouth Corp., at 19 (filed July 1, 2002) (characterizing CEI and ONA rules as "outdated rules and regulations that were implemented to address a problem that is nonexistent in the broadband market").

ONA AND CEI: USED AND USEFUL FOR INFORMATION SERVICES COMPETITION

A review of recent BOC Annual ONA reports filed with the FCC<sup>2</sup> shows ISPs use the ONA process to request new features/services, including for broadband. For example:

- BellSouth's April 15, 2003 report cited 19 new requests for ONA services from Enhanced/Information service providers in 2002, *including 18 requests for DSL-related services.*<sup>3</sup> In its April 15, 2002 ONA report, BellSouth cited 26 new requests from Enhanced/Information service providers in 2001, *including 25 requests for DSL-related services.*<sup>4</sup> In its Annual ONA Report of April 15, 2001, BellSouth states that it received 10 new requests in 2000, 8 of which were for DSL related services.<sup>5</sup> (See attached pages from BellSouth 2002 and 2001 ONA Reports describing ONA requests.)
- Verizon's April 15, 2002 ONA Amendment claims that Verizon received "one new complete ONA service request from unaffiliated Enhanced Service Providers."<sup>6</sup>
- SBC's April 15, 2001 report states that since its April 2000 filing, Southwestern Bell and Pacific Bell received two requests for new ONA services.<sup>7</sup> SBC's April 2000 report states that Southwestern Bell received one request for new ONA service.<sup>8</sup>

These reports also show that ONA requests can drive price competition and service quality, and have encouraged the deployment of new services. For example:

- ONA can drive price competition and service quality competition: In the past few years, BellSouth reports 15 ONA requests for symmetrical DSL (which would compete with BellSouth T1 services), and 20 ONA requests for service level agreements for DSL

---

<sup>2</sup> The ONA reports are publicly available from the FCC's website on ECFS under CC Docket No. 88-2.

<sup>3</sup> BellSouth Annual ONA Report, CC Docket No. 88-2 at 1 (filed April 15, 2003).

<sup>4</sup> BellSouth Annual ONA Report, CC Docket No. 88-2 at 1 (filed April 15, 2002).

<sup>5</sup> BellSouth Annual ONA Report, CC Docket No. 88-2 at 1 (filed April 15, 2001).

<sup>6</sup> Amendments to Verizon's ONA Plan, CC Docket No. 88-2 at A-2 (filed April 15, 2002).

<sup>7</sup> Southwestern Bell Telephone Company's, Pacific Bell Telephone Company's, Nevada Bell Telephone Company's and the Ameritech Operating Companies' Annual Open Network Architecture Report, CC Docket No. 88-2 at 3 (filed April 15, 2001).

<sup>8</sup> Southwestern Bell Telephone Company's, Pacific Bell Telephone Company's, Nevada Bell Telephone Company's and the Ameritech Operating Companies' Annual Open Network Architecture Report, CC Docket 88-2 at 3 (filed April 19, 2000).

provisioning (which would better ensure quick and reliable service to the public).<sup>9</sup>

- SBC states in its 2002 report that “...as a result of a 1999 ESP request, Pacific Bell designed and built an electronic ordering interface for the ESP...”<sup>10</sup> Such improvements facilitate ISP efficiency and order accuracy, and enhance competition.
- Qwest’s 2002 Report also cites the development of several new services based on ONA requests from 1990 to 1994, including various call forwarding features, prefix screening, answer supervision feature, and options for Integrated Services Digital Network.<sup>11</sup>

The reports demonstrate that ISPs made many ONA requests using the FCC’s ONA process for “new services”, and, by inference, these requests were needed because the BOCs’ current services did not address the ISPs’ needs.<sup>12</sup> Notably, due to a deficiency of BOC reporting or the reporting obligations themselves, the BOC ONA reports do not provide public information on the ongoing status of each ONA request, nor do the reports identify the ISP-requester or how the ISP may have used the requested ONA service in a retail ISP service.

Finally, important CEI principles are an essential “backdrop” for nondiscriminatory access each time an ISP orders BOC services. For example, the CEI parameter of “interface functionality” may appear to be an esoteric requirement, but consideration of a world without such a requirement – in which the BOC could effectively discriminate by forcing connectivity only through its own non-standard or proprietary interfaces – demonstrates the fundamental importance of parameters serving to ensure nondiscriminatory treatment. Accordingly, the CEI parameters are put to use *every day*, as ISPs order BOC services.

#### COSTS OF COMPLIANCE WITH *COMPUTER INQUIRY*

EarthLink appreciates that compliance with regulations is not cost-free for the regulatee, and that decisionmakers should weigh the benefits and costs of regulations. However, as a

---

<sup>9</sup> BellSouth 2001 Annual ONA Report at 1; BellSouth 2002 Annual ONA Report at 1; BellSouth 2003 Annual ONA Report at 1.

<sup>10</sup> Southwestern Bell Telephone Company’s, Pacific Bell Telephone Company’s, Nevada Bell Telephone Company’s and the Ameritech Operating Companies’ Annual Open Network Architecture Report, CC Docket No. 88-2 at 7 (filed April 15, 2002).

<sup>11</sup> Annual ONA Report of Qwest Corporation, CC Docket No. 88-2 at 4-5 (filed April 15, 2002).

<sup>12</sup> The actual number of ISP ONA requests may be higher than reported. BellSouth reported many more requests for DSL-related services in 2001 and 2002 than any other BOC. Since it is unlikely for BellSouth to have over-reported such requests or for ISPs to have focused solely on BellSouth and not on any other BOC, it raises a question as to whether the other BOCs have under-reported the actual number of DSL-related ONA requests received.

counterweight to the benefits of *Computer Inquiry* rules, the BOCs have provided little, if any, quantifiable evidence in the record suggesting that continued compliance with these rules would be unduly costly or difficult. Nonetheless, in an effort to streamline regulations, EarthLink's April 30<sup>th</sup> proposed ISP access rule would reduce the costs of compliance for the BOCs by eliminating the requirement of tariffing; the annual, semi-annual, and quarterly ONA reports; and the maintenance of CEI plans.<sup>13</sup>

The recent *ex parte* filings by BellSouth and Qwest completely miss several relevant issues regarding whether the costs of compliance with *Computer Inquiry* outweigh the benefits.<sup>14</sup> In both cases, the BOCs fail to provide data explaining the *actual costs* of continuing compliance, nor have they offered any evidence to substantiate their cost estimates. In particular, the BOCs have not shown a fair estimate of the prospective and incremental costs of compliance with *Computer Inquiry*, since it must be assumed the BOCs have already invested in existing procedures, systems, and network designs to comply with the *Computer Inquiry* obligations today. Similarly, in weighing the costs of *Computer Inquiry* requirements, it is important to note that the BOCs are free to recover their costs in DSL rates; no party even alleges in this proceeding that uncompensated regulatory costs are borne by the BOCs. Indeed, since the BOCs certainly do factor such costs into their DSL rates, it is the ISPs that ultimately pay the costs of the regulations and yet the record shows ISPs find great value in *Computer Inquiry*.

Moreover, many of the BOCs' listed costs of the BOC are not, in fact, costs attributable to *Computer Inquiry* obligations. For example, since the BOCs assert they will continue to provide DSL in a reasonable manner to ISPs in a deregulated environment,<sup>15</sup> it is not relevant to consider the costs of providing a "stand-alone" DSL product because any wholesaler, whether regulated or not, would incur costs of engaging in that business. As a result, the following costs are aspects of doing business that would apply: overhead and administration; repair, maintenance and customer service; OSS; equipment infrastructure, network and technical support costs.

---

<sup>13</sup> *Ex Parte* Notice of EarthLink, MCI and AOL Time Warner, CC Dkt. No. 02-33 (filed May 1, 2003).

<sup>14</sup> *Ex Parte* Notice of Qwest, CC Dkt. No. 02-33 (filed April 10, 2003); *Ex Parte* Notice of BellSouth Corp., CC Dkt. No. 02-33 (filed April 2, 2003).

<sup>15</sup> See e.g., USIIA and SBC Communications Inc. Joint Submission, CC Dkt. 02-33 (filed May 3, 2002) ("Memorandum of Understanding"); USIIA and Verizon, CC Dkt. No. 02-33 (filed July 1, 2002) (same); Reply Comments of BellSouth at 3 (filed July 1, 2002) (ISP concerns of deregulation are unwarranted because "ILECs will continue to provide wholesale transmission services to ISPs"). For the record, EarthLink continues to doubt these vague promises, and notes that the lack of record explanation of the terms and rates of such unregulated services leads only to the conclusion that, if unregulated, the BOCs do not intend to offer just, reasonable and nondiscriminatory DSL.

Similarly, the BOCs' asserted "duplication" expenses due to the alleged separation of telecommunications networks from information networks are unclear. Not only have the BOCs failed to explain what duplication expenses are involved, but it would appear that duplication issues are actually a product of the BOCs' own decisionmaking and choices, if they exist at all. Finally, even assuming *arguendo* some "duplication" costs, these costs would continue to apply when the BOC offers a telecommunications service to ISPs under Title II, irrespective of ONA and CEI obligations. Indeed, without some separation or cost allocation of the "stand-alone" transmission services from the BOC's information service, cross-subsidization would be the likely result.

Qwest has failed to provide qualitative or quantitative evidence to support its assertion that CEI and ONA rules force "disclosure of technical and product feature functionality to competitors" or prevent Qwest from "chang[ing] business priorities in response to market demands."<sup>16</sup> As an initial matter, Qwest's preferred ISP is not regulated by the FCC and is under no FCC constraints with regard to its information services products. Further, Qwest's assertion is erroneous because the specific regulatory obligations complained of -- network disclosure and CPNI -- are, in fact, independent statutory obligations<sup>17</sup> that are not *Computer Inquiry* obligations. Thus, the costs of these regulatory obligations are not properly included in the costs of compliance with the *Computer Inquiry* obligations.

Similarly, in a slide presentation filed without additional detail or support, BellSouth asserts that *Computer Inquiry* costs include "[e]xtensive work to create artificial network demarc for tariffed services."<sup>18</sup> This claim is vague and inadequate. While BellSouth asserts that tariffing services without protocol conversion "requires duplicate infrastructure" due to ISP expectations, EarthLink is aware of no need for duplication or duplication costs, which are

---

<sup>16</sup> Qwest *ex parte* at 11.

<sup>17</sup> Section 251(c)(5) and the FCC's implementing regulations, 47 C.F.R. §§ 51.325-51.335, establish an incumbent LEC's network disclosure obligations. As a result, the FCC has supplanted the former *Computer Inquiry* obligations. *In the Matter of Computer III Further Remand Proceedings, Report and Order*, 14 FCC Rcd. 4289, ¶ 44 (1999). Similarly, CPNI obligations are now based on Section 222 of the Act, 47 U.S.C. § 222, and the FCC's implementing rules, 47 C.F.R. § 64.2001, *et seq.*, and are not currently a part of the *Computer Inquiry* requirements. *In the Matter of Implementation of the Telecommunications Act of 1996, Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 8061, ¶ 193 (1998), *partially vacated by, U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

<sup>18</sup> BellSouth *ex parte* at 5.

█ **Lampert & O'Connor, P.C.**

*Ex Parte* Presentation – May 12, 2003

Page 6

completely unexplained by BellSouth.<sup>19</sup> Moreover, while BellSouth suggests it must employ a duplicative set of employees and trucks to deal with trouble reporting,<sup>20</sup> *Computer III* expressly permits integrated BOC offerings. As a result, BellSouth's internal customer service processes would appear to be the result of its business choices, including how BellSouth handles incoming calls initiated from different points of its customer care operations and how BellSouth repair issues are resolved. For example, while BellSouth claims (without any support) that "dual dispatches" require an additional \$6 million annually, it is unclear whether, if such costs do exist, BellSouth could not avoid such costs through appropriate cost allocation of regulated and nonregulated services performed in a single dispatch.

BellSouth also claims additional expenses for other service features (e.g., "Retail GUI" and "DSL Appointment Database") that are not truly "regulatory" costs -- they are functionalities necessary to service wholesale customers regardless of *Computer Inquiry* obligations, and their costs are what wholesale providers would naturally invest to ensure the ordering, service installation, and repair processes run more smoothly. BellSouth also claims that *Computer Inquiry* inhibits price flexibility, but *Computer Inquiry* does not prevent BellSouth from "passing along savings of more efficient architectures" by reducing wholesale DSL prices for all ISPs and, with BellSouth's pervasive pricing flexibility relief, no Commission rule prevents it from making DSL price changes on one day's notice. BellSouth asserts that the cost imputation rules, such as the "two mile" rule, are "archaic" and costly, but this requirement addresses an inherent discrimination issue: a BOC may collocate its own information services equipment while independent ISPs do not have those same collocation rights.<sup>21</sup> Thus, BellSouth could likely avoid these "costs" by choosing to offer ISP collocation or by otherwise addressing the discrimination issue; indeed, the *Computer Inquiry* framework encourages the BOC to find alternative means of minimizing ISP transport costs.<sup>22</sup> In any event, since independent DSL-based ISPs do not have the benefit of collocation with the BOC and so must also purchase separate T1 connections to reach the BOC's ATM networks, there is nothing "archaic" about this cost imputation rule or its purpose in avoiding discrimination.

In sum, the benefits of *Computer Inquiry* are well documented, but the BOCs' efforts to show the offsetting costs have been lacking. Neither the Commission nor the parties, however,

---

<sup>19</sup> Also wholly unexplained is BellSouth's assertion that, due to *Computer Inquiry* requirements, it "has to develop two services to introduce one to the market" with a "cost penalty of \$500k minimum per new service." BellSouth *ex parte* at 6.

<sup>20</sup> BellSouth *ex parte* at 7.

<sup>21</sup> *Third Computer Inquiry, Report and Order*, 104 F.C.C. 2d 958, 1037-38, ¶¶ 151-153 (1986) (subsequent history omitted).

<sup>22</sup> *Id.*, ¶ 164. Further, BOCs have received many waivers of CEI obligations upon a showing that the public interest would be served, which would include that BellSouth's avoidance of the "two-mile" rule would not create a discriminatory benefit for its preferred, collocated ISP.

**■ Lampert & O'Connor, P.C.**

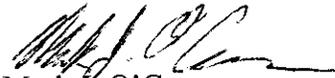
*Ex Parte* Presentation – May 12, 2003

Page 7

can truly compare the relevant costs to the benefits until the BOCs provide record evidence that is relevant and verifiable.

Pursuant to Section 1.1206(b) of the Commission's Rules, eight copies of this letter 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,



Mark J. O'Connor  
Kenneth R. Boley  
Counsel for EarthLink, Inc.

cc: Christopher Libertelli  
Matthew Brill  
Jessica Rosenworcel  
Daniel Gonzalez  
Lisa Zaina  
William Maher  
Scott Bergmann  
Carol Matthey  
Jane Jackson  
Michelle Carey  
Brent Olsen  
Cathy Carpino  
James Carr  
Harry Wingo  
Linda Kinney  
Christopher Killian

## BellSouth

04-15-03

### Report 2 – Disposition of New ONA Service Requests

BellSouth received the following requests for new ONA capabilities from Enhanced/Information Service Providers (ESPs/ISPs) in 2002.

**Request # 1:** This ISP request inquired about the availability of a Multi Quality of Service (QoS) product. BellSouth responded that it is currently developing such a product and plans to offer pursuant to tariff in November 2003.

**Requests #2 -7:** These ISP requests inquired about the availability of VPI/VCI management services in BellSouth's DSL product suite. BellSouth responded that it is currently developing the necessary operating system to support management of VPI/VCI assignments for ISPs, with product availability scheduled for mid 2003.

**Requests #7 - 12:** These ISP requests inquired about the availability of Mean Time to Repair (MTTR) Service Level Agreements (SLAs) for BellSouth's Business Class and Symmetrical DSL products. BellSouth is working with ISP's to more clearly define MTTR SLAs, and plans to offer pursuant to tariff in early 2004.

**Requests #12 - 19:** These ISP requests asked for specific enhancements to BellSouth's existing BellSouth ADSL Service, End-User Aggregation Tariff. One request was to add Business Class and Symmetrical DSL capability to our End-User Aggregation Tariff. BellSouth is currently developing the ability to support UBR QoS through the EUA tariff, and plans to offer pursuant to tariff in early to mid 2004.

## DISPOSITION OF NEW ONA SERVICE REQUESTS

April 15, 2002

The Commission requires BellSouth to list all requests for new ONA capabilities received during the previous year under the ESP Request Process. The Commission also requires BellSouth to report annually on the final disposition of new service requests previously identified as needing further evaluation.

BellSouth received the following requests for new ONA capabilities from Enhanced/Information Service Providers (ESPs/ISPs) in 2001.

**Request # 1:** This ISP request inquired about the availability of a Multi PVC product.

BellSouth responded that it is currently developing such a product and plans to offer pursuant to tariff in June 2002.

**Requests #2 –11:** These ISP requests inquired about the availability of symmetric DSL (SDSL) services in BellSouth's DSL product suite.

BellSouth responded that it is currently developing the necessary operating system to support this type of service via the ITU standard G.SHDSL, with product availability scheduled for late 2002.

**Requests #12 – 21:** These ISP requests inquired about the availability of Service Level Agreements (SLAs) for BellSouth's DSL products.

BellSouth is working with ISP's to more clearly define SLA's and what our customers want out of them.

**Requests #22 – 26:** These ISP requests asked for specific enhancements to BellSouth's existing BellSouth ADSL Service, End-User Aggregation Tariff. One request was for a conversion capability from ATM to BellSouth ADSL Service, End-User Aggregation (or vice versa).

Beginning in early 2002, BellSouth permitted small numbers of conversions and is tariffing an option to support large numbers of conversions. The tariff is expected to become effective in May 2002.

**DISPOSITION OF NEW ONA SERVICE REQUESTS**

**April 15, 2001**

The Commission requires BellSouth to list all requests for new ONA capabilities received during the previous year under the ESP Request Process. The Commission also requires BellSouth to report annually on the final disposition of new service requests previously identified as needing further evaluation.

BellSouth received the following requests for new ONA capabilities from Enhanced Service Providers (ESPs) in 2000.

**Request # 1 - 2** These ESP requests were for BellSouth to provide the ability for an ESP to order the Call Forward/Don't Answer capability on behalf of ESP's customer on a bulk basis.

BellSouth concluded that the requested capability could be satisfied via use of its Vendor Service Center personnel. ESPs submit bulk requests via use of Excel spreadsheets. The Excel spreadsheets may be transmitted either electronically or by FAX machine. ESPs are required to obtain customer approval prior to submitting such requests to BellSouth.

**Request #3 - 6** These ESP requests inquired about the availability of SDSL- symmetric DSL services in BellSouth's DSL product suite.

BellSouth responded that it is currently developing the necessary operating system to support this type of service via the ITU standard G.SHDSL with product availability scheduled for late 2001.

**Request #7- 10** These ESP requests inquired about the availability of SLAs – Service Level Agreements- for BellSouth's DSL products.

BellSouth responded that it is investigating the logistics of structuring such an agreement for its current business class DSL products. The isolation of latency is one of the many issues to be worked out.