

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:	)	
	)	
AT&T Corp. Petition Pursuant to 47 U.S.C.	)	WC Docket No. 03-256
Section 160(c) of the Communications Act	)	
For Forbearance from Enforcement of	)	
Section 204(a)(3) of the Communications Act	)	
	)	

**REPLY COMMENTS OF EARTHLINK, INC.**

EarthLink, Inc. (“EarthLink”), by its attorneys, respectfully submits these Reply Comments in the above-referenced docket concerning the Petition for Forbearance of AT&T Corp. filed on December 3, 2003 (“AT&T Petition”).<sup>1</sup> EarthLink agrees with AT&T that the proposed forbearance would substantially serve the public interest and assist in ensuring that local exchange carrier (“LEC”) rates, terms and conditions are “just and reasonable and are not unjustly or unreasonably discriminatory.”<sup>2</sup> In light of its experience with the streamlined tariff process since the implementation of Section 204(a)(3) of the Communications Act, and its strong reliance upon enforcement and the Section 208 complaint process, the FCC should exercise its ample forbearance authority to serve the public interest while also retaining a streamlined tariff process.

**INTRODUCTION AND SUMMARY**

EarthLink is currently one of the largest providers of Internet access services in the United States with over 5 million subscribers nationwide, of which over one million are

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<sup>1</sup> “Pleading Cycle Established for AT&T’s Petition for Forbearance from Enforcement of ‘Deemed Lawful’ Provision of Section 204(a)(3) of the Act,” Public Notice, WC Docket No. 03-256 (Dec. 24, 2003).

<sup>2</sup> 47 U.S.C. § 160(a).

broadband subscribers. To provide its information services to its end-user customers, EarthLink substantially relies upon access services, including special access services such as xDSL, offered by large incumbent LECs, especially Bell Operating Companies (“BOCs”). As such, EarthLink has a strong interest in ensuring that the rates, terms and conditions for these needed access service inputs are just, reasonable and non-discriminatory.

The grant of AT&T’s Petition would greatly serve the public interest by enhancing the FCC’s ability to ensure that LECs offer just and reasonable access rates, terms and conditions even as they continue to enjoy significant benefits of streamlined tariff filings. Experience since the passage of the Telecommunications Act of 1996 (“1996 Act”) underscores the importance of the FCC’s enforcement process, especially the Section 208 process, as a check on unlawful pricing and terms. Indeed, the FCC’s increased emphasis on enforcement since the 1996 Act is especially important given that pre-effective tariff review is often impracticable.

In light of these developments and the FCC’s experience with streamlined tariffing, it mocks the enforcement process and disservices the public interest and the express goals of the Communications Act if LECs that offer services under unlawful rates and terms are essentially given a “free pass” even when a customer expends the enormous resources required and proves unlawfulness in a Section 208 complaint. In addition to providing a check on LEC anticompetitive practices, the requested forbearance would also enhance competition, an explicit goal of the FCC and the Communications Act.

The FCC has ample authority to forbear as proposed by AT&T despite the contention of many incumbent LECs that such action would not be “deregulatory.” Section 10 grants the FCC sufficient flexibility to respond to actual market conditions and the experience gained from implementing Congress’ streamlined tariffing framework. Indeed, to argue that the FCC may

not forbear because it would undermine an express directive of Congress would be to turn the entire notion of forbearance on its head. Had Congress desired to limit the FCC from forbearing from Section 204(a)(3), it could have stated so expressly as it did for other sections of the Communications Act.<sup>3</sup> Instead, the language of Section 10 underscores that Congress gave paramount importance in Section 10 to forbearance that serves the public interest, that protects consumers, and that ensures rates and terms are just and reasonable.

**THE FCC SHOULD EXERCISE ITS AMPLE FORBEARANCE AUTHORITY TO ENSURE ITS REGULATIONS SERVE THE PUBLIC INTEREST**

**A. Experience With Streamlined Tariffs Underscores That Absent Forbearance, LECs Are Insulated From Liability for Unlawful Pricing and Practices**

In the eight years since the passage of the 1996 Act, the FCC has had extensive experience with the streamlined tariff process, including experience with challenges to LEC rates, terms and conditions. While streamlining has produced substantial benefits for LECs, shortening the time for public and agency review, and presumably allowing LECs to effectuate more rapid responses as market conditions become more competitive, it has also limited the opportunity for parties to bring effective challenges to tariff filings, especially as issues concerning rates are often complex and require expertise unlikely to be acquired in the short period allotted for pre-effective review. As some parties note in their comments,<sup>4</sup> the FCC's practice under these circumstances is to allow the overwhelming majority of challenged tariffs to go into effect, and to rely on formal complaints by private parties that wish to challenge the lawfulness of a tariff filing.<sup>5</sup> However much the FCC may have anticipated a meaningful pre-

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<sup>3</sup> See, e.g., 47 U.S.C. § 160(d).

<sup>4</sup> See, e.g., General Communication, Inc. Comments at 3; Sprint Comments at 1. See also AT&T Petition at 8-9.

<sup>5</sup> *Id.*

effective review process, actual experience has shown that challenging parties must rely almost exclusively on post-effective enforcement.

As an example, EarthLink recently challenged a tariff filing alleging that a LEC's filed cost justification data demonstrated that the proposed rate would recover an unreasonable and discriminatory amount of overhead or common costs and thus would violate the proscriptions in Sections 201(b) and 202(a) of the Communications Act against unjust, unreasonable and unreasonably discriminatory pricing.<sup>6</sup> To be sure, it requires swift action for interested parties to mount these challenges and garner needed resources in the few days before the filings take effect, diminishing the likelihood that any party could actually make the *prima facie* showing in such a short period when data and relevant facts are often unavailable and/or complex. Furthermore, in those instances when a party such as EarthLink is able to garner the resources necessary and file a rushed tariff challenge, the FCC staff has often as little as only a single day to review it and decide whether to suspend and/or investigate. Perhaps for this reason, the FCC almost always rejects petitions concerning streamlined filings, instead steering parties to the Section 208 process.<sup>7</sup> Indeed, the FCC has stated “[t]he lawfulness of an effective rate, however, remains subject to . . . a complaint proceeding initiated pursuant to section 208 of the Act.”<sup>8</sup>

EarthLink takes the FCC's commitment to the Section 208 process seriously. As such, EarthLink has been willing to expend enormous resources to evaluate often complex cost and

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<sup>6</sup> *In the Matter of Qwest Corporation Tariff F.C.C. No. 1, Earthlink Petition to Suspend and Investigate*, (Dec. 5, 2003) (challenging Qwest Streamlined Filing, Transmittal No. 178, filed Nov. 28, 2003).

<sup>7</sup> See, e.g., “Protested Tariff Transmittals Actions Taken,” *Public Notice*, DA 03-3966 (Dec. 15, 2003) (FCC requires parties to present “compelling arguments that these transmittals are so patently unlawful as to require rejection.”)

<sup>8</sup> *In the Matter Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, Report and Order*, 12 FCC Rcd. 2170, ¶ 11 (1997).

price relationships and to retain the necessary legal and economic expertise to meet the rigorous standards of the Section 208 formal complaint process. Particularly when LEC access rates are at issue, this undertaking can be huge and burdensome, especially to a relatively small single customer that seeks to challenge the rates of the BOCs. Absent the relief that AT&T seeks, even if aggrieved parties ultimately prove unlawful rates and terms, the LECs would essentially receive a “free pass” for their unlawful conduct until such time as the FCC adjudicates an illegal rate. While the FCC is correct that there are significant public interest benefits to shifting to an enforcement-centric approach,<sup>9</sup> there must be a genuine “stick” if it is to be effective.

Indeed, unless the FCC grants the AT&T Petition, LECs have ample incentive to engage in anticompetitive and unlawful practices for streamlined access services since they would be effectively insulated from the consequences and damages caused to other parties. In fact, incumbent LECs today retain the benefits of illegal pricing or unlawful terms until they are proved unlawful, leaving customers – who are often also competitors – to bear the burden of unlawful practices without a genuine and meaningful opportunity for redress. Rather than serve the public interest and protect consumers, the experience the FCC has gained demonstrates that Section 204(a)(3) undermines these goals.

#### **B. Section 10 Permits the FCC To Ensure That Statutory Goals And The Public Interest Are Served**

Although some commenters urge that the FCC may not use its Section 10 forbearance authority to grant the relief AT&T’s Petition requests, nothing in Section 10 or its legislative

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<sup>9</sup> See, e.g., *In the Matter of Implementation of the Telecommunications Act of 1996 Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd. 22497 ¶ 2 (1997) (“[I]n order to fulfill the goals and meet the statutory deadlines of the 1996 Act, we must revise our formal complaint rules to provide a forum for prompt resolution of all complaints of unreasonably discriminatory or otherwise unlawful conduct by telecommunications carriers, and thus to reduce impediments to robust competition in all telecommunications markets.”).

history would bar the FCC from such action. Specifically, the language of Section 10 permits the FCC to forbear from enforcement of a particular statutory provision where the three-prong test of Section 10(a) is met. Nothing in Section 10 mandates that forbearance must have a deregulatory impact on incumbent carriers. Section 10 of the 1996 Act was viewed as a vital tool for agency authority, designed to address statutory limitations on the FCC's ability to adjust its regulatory paradigm as circumstances evolved. Prior to the 1996 Act, the FCC found that it was limited in its ability to adapt its regulation even when it found the public interest was being thwarted, such as when it determined that tariff forbearance in competitive markets would better serve consumers.<sup>10</sup>

Moreover, from the perspective of access customers and BOC competitors, the AT&T Petition requests deregulatory relief. Common law provides that adjudications apply retroactive relief, including damages, for plaintiffs harmed by defendants' illegal acts. Because the AT&T Petition would merely allow this common law principle to apply in the context of a streamlined tariff dispute where it would otherwise be specifically blocked by the "shall be deemed lawful" language of Section 204(a)(3), the AT&T Petition seeks relief and deregulation from that insular statutory provision. In other words, Section 204(a)(3) imposes an artificial regulation of the FCC's own complaint process which is contrary to the public interest. The AT&T Petition seeks to redress this.

Certainly, the FCC has previously exercised its forbearance authority for deregulatory purposes and Congress has clearly sought to promote competition and deregulation where possible. That said, the overall thrust of Section 10, as evidenced by the language of the

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<sup>10</sup> MCI Telecommunications Inc. v. AT&T, 512 U.S. 218 (1994) (The FCC was unable to forbear even when it found the public interest was served since no express statutory authority had been given).

provision itself, is to promote competition and the public interest,<sup>11</sup> not deregulation as an end unto itself.<sup>12</sup> Congress made these purposes clear, noting that forbearance authority serves to ensure that regulation of the telecommunications industry remains current in light of changes in the industry. Congress expressly stated that in making the determination as to whether to forbear, the Commission shall consider whether forbearance would promote competition.<sup>13</sup>

In today's environment, the grant of the AT&T Petition would promote competition, especially for broadband-based services. As the Commission has noted, consumers are well-served through vibrant competition in the broadband Internet access services arena and entities such as EarthLink have successfully offered consumers broadband information services that add to customer satisfaction, diversity and innovation.<sup>14</sup> At the same time, because EarthLink and

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<sup>11</sup> Indeed, Section 10, "Competition in the Provision of Telecommunications Services," repeatedly references the paramount importance of competition, as well as the protection of consumers. See 47 U.S.C. §§ 160(a)(2), (a)(3), (b). See also, Cellular Telecommunications & Internet Ass'n v. FCC, 330 F.3d 502, 505 (D.C. Cir. 2003) (Section 10 serves the goals of the 1996 Act, ". . . to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

<sup>12</sup> Just last Friday, the D.C. Circuit rejected ILEC arguments for a narrow construction of Section 11 of the 1996 Act, the companion to Section 10, and rebuffed a statutory interpretation for "a presumption in favor of [carrier] deregulation." Cellco Partnership v. FCC, Case No. 02-1262, slip op. at 15 (D.C. Cir. Feb. 13, 2004).

<sup>13</sup> See, e.g., H.R. CONF. REP. NO. 104-458, at 184 (1996) ("In making the determination to forbear, the Commission shall consider whether forbearance would promote competition."); Statement of Senator Larry Pressler, 141 CONG. REC. S7881 (1995) ("S.652 ensures that regulations applicable to the telecommunications industry remain current and necessary in light of changes in the industry."). See also, *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order, 13 FCC Rcd 16857 (1998) (noting that forbearance is appropriate when rules inhibit or distort competition in the marketplace or stand as obstacles to lower prices, greater service options and high quality services for consumers).

<sup>14</sup> *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶ 3 (1999); J.D. Power and Associates 2002 Syndicated Internet Service Provider Residential Customer Satisfaction Study.

similarly situated entities find themselves in the dual roles of LEC customer as well as competitor, there is an incentive and ability for anticompetitive conduct by incumbent LECs. While EarthLink remains hopeful that telecommunications service competition will progress, the fact is that today, the incumbent LECs – particularly the BOCs – have ample incentive to establish rates, terms and conditions for underlying access service inputs that thwart the ability of companies like EarthLink to compete fully and fairly. While incumbent LEC incentives for anticompetitive behavior may not be completely eliminated if the FCC were to forbear as requested in the AT&T Petition, there would be a significant check on the *ability* of these LECs to act on those incentives, thus meeting the express goals and purposes of Section 10.

Notably, the relief requested in the Petition would not alter the basic streamlining that the FCC has adopted for LEC tariffs. To be sure, streamlining allows carriers to deploy services more quickly, allowing carriers to offer services without the delays associated with traditional tariffing, which historically was a 120 day process. While four months may have been well-suited to an era where technological progress came more slowly, the streamlined tariffing process – with its 7 – and 15-day notice periods – allows carriers to introduce services more rapidly, to respond to competition and technological change, and arguably to serve consumers better.<sup>15</sup> Notably, these benefits would persist even if the FCC grants the AT&T Petition. Indeed, the FCC should reasonably conclude that such a result is a win-win situation – competition would be enhanced further even as LECs retain the benefits of tariff streamlining.

Finally, the arguments that some parties raise urging that AT&T lacks standing to seek FCC forbearance are wholly without merit and should be rejected. In fact, the legal precedent

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Study conducted among national and regional ISP's based on 4,629 responses *available at* [www.jdpower.com](http://www.jdpower.com).

<sup>15</sup> See *In the Matter Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, Report and Order*, 12 FCC Rcd. 2170 ¶ 5-6 (1997).

cited by some parties is inapt as it concerns standing for petitions to deny broadcast licenses,<sup>16</sup> which is not at issue here. Nevertheless, the cited case law expressly notes that standing exists where the party can show, as AT&T can here, that its interests are within the “zone of interests” to be protected.<sup>17</sup> Here, AT&T, as an access customer of the LECs, indisputably has an interest in ensuring that the FCC’s rules serve competition and promote just and reasonable rates and terms. While incumbent LECs may prefer that Section 10 be interpreted so that it is available only when it serves their interests, that is not what the statute directs. Given the overarching purposes of Section 10 and the Communication Act to promote competition to benefit the public interest, the FCC should correctly consider and grant the relief requested in the AT&T Petition.

#### CONCLUSION

For the foregoing reasons, and in light of its experience with the streamlined tariff process since the implementation of Section 204(a)(3) of the Communications Act, and its strong reliance upon enforcement and the Section 208 complaint process, the FCC should exercise its ample forbearance authority to serve the public interest as requested in the AT&T Petition.

Respectfully submitted,

By: \_\_\_\_\_/s/\_\_\_\_\_

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<sup>16</sup> See, e.g., Comments of NECA, et al.

<sup>17</sup> *Id.*