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

Donna N. Lampert
lampert@l-olaw.com

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

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Ms. Marlene Dortch, Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street SW
Washington, DC 20554

Re: *Ex Parte* Presentation – *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On March 18, 2004, Dave Baker, Vice President, Law and Policy for EarthLink, Inc., and the undersigned, of Lampert & O'Connor, P.C., met with Matthew Brill of the Office of Commissioner Abernathy to discuss the issues raised in the October 24, 2003, *Ex Parte* filing of Verizon in the above-referenced dockets seeking forbearance from Section 271 unbundling obligations for next generation broadband networks.

Specifically, EarthLink urged the FCC to consider carefully the state of the record regarding Verizon's forbearance request and reviewed FCC precedent regarding the required showings for forbearance under Section 10, especially Section 10(a)(1). EarthLink explained that the FCC has found that even in circumstances where there is competition – which is not the case for broadband transmission services – additional measures and specific conditions may be necessary to ensure that service rates and practices are just and reasonable and not unreasonably discriminatory.[1] EarthLink explained that an FCC decision to exercise its Section 10 forbearance authority "must be based on a record that contains more than broad, unsupported allegations of why those criteria are met."[2]

EarthLink also noted current obligations upon the Bell Operating Companies ("BOCs"), including Verizon, to offer non-discriminatory access to telecommunications services to information service providers, and stressed the importance of ensuring that any decision

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[1] *See, e.g., 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 and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 ¶ 21-22 (1998); *In the Matter of Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance,* Memorandum Opinion and Order, 14 FCC Rcd 16252 ¶ 64 (1999).

[2] *In the Matters of Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities,* Memorandum Opinion and Order, 13 FCC Rcd. 2627 ¶ 16 (1998).

regarding possible forbearance from Section 271 broadband unbundling requirements be consistent with the continuation of these obligations. EarthLink explained that there is nothing about the evolution of BOC broadband networks that makes unbundling impossible or difficult, especially in the context of non-discriminatory access to basic transmission services for information service providers. Indeed, the *Computer Inquiry* obligations do not require network infrastructure to be separated between regulated and non-regulated components. Instead, the BOCs are simply required to offer basic transmission services separately from their information services, a process that often involves nothing more than an appropriate allocation of equipment and service costs. The Commission fully expected the BOCs to integrate regulated and non-regulated functions *e.g.*, to locate the facilities necessary for protocol processing (an information service) in their central offices in order to market protocol conversion, basic transmission and switching services on an integrated basis.[3]

EarthLink noted that the *Computer Inquiry* framework does not prevent the BOCs from offering any information services at any point in the network or from integrating the provision of services in a cost effective manner. Moreover, the fact that new equipment integrates several functions does not by itself make it impossible to identify a basic transmission component. Notwithstanding Verizon's characterization, there is no reason to "alter the network" to offer basic transmission services. As such, EarthLink stressed that in considering forbearance from Section 271 unbundling obligations for broadband services, the FCC should clearly explain the differences between the goals and requirements of Sections 251 and 271 on the one hand, and the *Computer Inquiry* framework on the other, and reiterate the continuing public interest need to ensure nondiscriminatory access to transmission services for information service providers.

Pursuant to the Commission's rules, one copy of this memorandum is being filed electronically in each of the above-referenced dockets for inclusion in the public record. Please do not hesitate to call me if you have any questions.

Respectfully submitted,
/s/
Donna N. Lampert
Counsel for EarthLink, Inc.

cc: Matthew Brill

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[3] *Amendment of Sections 64.702 of the Commission's Rules and Regulations, (Third Computer Inquiry),* Report and Order, 2 FCC Rcd 3072, 3078 (1987) ("...nonstructural safeguards, rather than the structural separation rules… should eliminate the major sources of inefficiencies these carriers assert they have encountered in their efforts to participate in this competitive market.") The FCC further explained: "A BOC could provide this service by performing the protocol conversion at its end office facilities and then providing transmission to the enhanced service provider's node over the BOC's own packet network. The regulated packet transmission component of the BOC's service could be billed as a BSE and the protocol processing component would be billed as an enhanced service."[3] *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* Memorandum Opinion and Order, 3 FCC Rcd 1150, 1151 (1988).