BellSouth Corporation
Legal Department
Suite 900
1133 21st Street, N.W.
Washington, D.C. 20036-3351

barbee.ponder@bellsouth.com

L. Barbee Ponder IV
Senior Regulatory Counsel-D.C.

202 463 4155
Fax 202 463 4605
Cell 202 215-6364

April 20, 2004

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

Re: Ex Parte Presentation, WC Docket Nos. 02-33, 98-10, 95-20, 01-337; CC Docket No. 02-52

Dear Ms. Dortch:

BellSouth Telecommunications, Inc. ("BellSouth") has previously provided information to the Commission to refute the assertions made by EarthLink, Inc. ("EarthLink") regarding the continued need to impose the *Computer Inquiry* and Title II common carriage regimes on BellSouth's broadband Internet access services. [1] In these filings, BellSouth highlighted the difference between EarthLink's advocacy before this Commission and its competitive actions in the Internet access marketplace.

With this *ex parte* presentation, BellSouth refutes EarthLink's more recent advocacy that continues to support a regulatory regime that grows more anachronistic with each passing day. As support, BellSouth again relies upon EarthLink's actual behavior in the market place based upon, among other things, the information provided in EarthLink's recently filed Form 10-K, a copy of which is attached as Exhibit "A."

As detailed herein, EarthLink's advocacy before this Commission continues a wide departure from its actions in the broadband marketplace. In its Form 10-K, EarthLink summed up the competitive nature of the marketplace as follows:

---

[1] *See* Ex Parte Letter from Jonathan Banks, General Attorney, BellSouth to Marlene Dortch, Secretary, FCC (June 5, 2003) (June 5 *ex parte*); Ex Parte Letter from L. Barbee Ponder IV, Counsel for BellSouth, to Marlene Dortch, Secretary, FCC (Aug. 11, 2003) (Aug. 11 *ex parte*).

> The intensity of competition in the telecommunications industry has resulted in significant declines in pricing for telecommunications services that we purchase, and such declines have had a favorable effect on our operating performance....[p. 10]

Given the intensely competitive nature of the broadband market as described by EarthLink, the Commission should finally act to allow all broadband service providers to compete on a level playing field.

EarthLink's recent claims that RBOC compliance with existing Computer Inquiry rules requires nothing more than accounting allocations is false.

Recently, EarthLink represented to the Commission that RBOC compliance with the *Computer Inquiry* regulation of their broadband services was neither difficult nor costly:

> [T]he *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.[2]

EarthLink's representations miss the mark entirely. As BellSouth has previously explained, in attempting to comply with the existing *Computer Inquiry* requirement to break out and offer a basic transmission service for each of its enhanced service offerings, the least costly approach in many instances is to segregate the regulated and non-regulated functions, a process that erodes entirely the efficiencies and benefits of the enhanced services that justified their development and introduction in the first place.[3]

While EarthLink makes very general claims to the effect that the *Computer Inquiry* rules do 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," EarthLink fails to address the fact that as technology improves and permits the deployment of more efficient and more sophisticated network designs that integrate enhanced and basic functionalities, the cost of continued compliance with the *Computer Inquiry* requirements increases sharply.

BellSouth has previously documented regulatory costs of $6.58 per customer per month to comply with regulatory requirements that are not imposed on the *dominant* provider of broadband services, cable.[4] These direct costs are in addition to the

---

[2] Ex Parte Letter from Donna N. Lampert, Counsel for EarthLink, to Marlene Dortch, Secretary, FCC (March 19, 2004) (March 19 *ex parte*) at 2.
[3] *See* Aug. 11 *ex parte*.
[4] *Id.*

significant other costs that are borne by the public in general resulting from the delayed introduction of wireline broadband services in competition with the numerous alternatives present in the marketplace.

These regulatory compliance costs are real and grow more debilitating to the wireline industry as competition continues to increase from unregulated competitive providers. By finally taking action in the above-referenced proceedings that have remained both pending and unresolved for years, the Commission can eliminate many of these unnecessary regulatory costs that continue to warp competition in the broadband marketplace.

EarthLink does not use the basic transmission that BellSouth is obligated to provide pursuant to the Computer Inquiry regime to serve any of its subscribers in BellSouth's service area.

While attempting to downplay the impact and cost of the *Computer Inquiry* regime, EarthLink fails to mention the fact that it does not purchase the less efficient basic transmission that companies such as BellSouth are obligated to provide under the *Computer Inquiry* rules. Indeed, after reaching a commercially negotiated agreement with BellSouth for a more efficient, enhanced service offering last year,[5] Earthlink migrated its entire embedded base of existing subscribers using the less efficient, tariffed basic transport product to the more efficient, non-tariffed, enhanced Internet service arrangement. This migration was completed by the end of November 2003.

Thus, as of the end of last year, EarthLink stopped all purchases of BellSouth's tariffed basic transmission service, the same service that it continues to claim is vital to its ongoing operations. Indeed, if BellSouth stopped offering its tariffed basic transmission service tomorrow, its actions would not have any impact whatsoever upon EarthLink's continuing operations.

BellSouth has previously explained that it is motivated to negotiate innovative enhanced service offerings with independent ISPs such as EarthLink, even though there is no regulatory compulsion to do so, because of the numerous competitive choices that EarthLink and its consumers have for high-speed Internet access services.[6] In its 10-K, EarthLink recognizes the fact that it can maintain a superior bargaining position vis-à-vis various potential Internet access providers by growing its retail customer base:

> We leverage our national footprint by continuing to migrate customers to lower cost telecommunications networks, utilizing volume discounts and managing the network to increase its efficiency. [p. 2]

---

[5] *See* June 5 *ex parte* at 12-15.
[6] *See* June 5 *ex parte* at 16-18.

> In light of regulatory and market developments, our strategy for gaining continuing access to wholesale broadband DSL and cable services at favorable prices is to create active and healthy competition for our business between ILECs and cable providers in major markets. To do this, we are attempting to gain access to more cable systems over which we can offer our services and to demonstrate our ability to deliver meaningful volumes of customers to our DSL and cable providers by continuing to actively grow our retail broadband subscriber base. We are also exploring the commercial feasibility of emerging alternative broadband access technologies, including power line, fixed wireless and other technologies, to gain wholesale broadband access and as an added means of creating wholesale broadband access competition. [p. 8]

As previously quoted, EarthLink further acknowledges that it has benefited financially from this increased competition and leveraging of its expanding customer base:

> The intensity of competition in the telecommunications industry has resulted in significant declines in pricing for telecommunications services that we purchase, and such declines have had a favorable effect on our operating performance....[p. 10]

EarthLink's continued carping about the need to maintain the existing regulatory regime because of the lack of competitive alternatives for "broadband transmission services" simply does not square with the facts.

No more than half of EarthLink's broadband subscriber base within BellSouth's service area uses BellSouth's services.

By letter dated September 24, 2003, EarthLink described itself as a "major independent Internet service provider (ISP) delivering broadband high speed Internet access to approximately one million consumers in the U.S., the majority of which are served using DSL."[7] EarthLink does not state what percentage of its one million consumers in the U.S. are served using RBOC-provided DSL transmission facilities, as opposed to its own DSL facilities or the DSL facilities of other competitive local exchange carriers ("CLECs") such as Covad. The information provided in its recently filed 10-K suggests that many, if not most, of EarthLink's DSL customers are being served using the DSL facilities provided by companies other than BOCs. Indeed, consistent with its representations in prior SEC filings, EarthLink states:

[7] Ex Parte Letter from Mark J. O'Connor, Counsel for EarthLink, to Marlene Dortch, Secretary, FCC (September 24, 2003) (Sept. 24 *ex parte*), p. 1.

> [O]ur largest provider of broadband connectivity is Covad Communications Group, Inc. We also do lesser amounts of business with a wide variety of local, regional and other national providers. EarthLink purchases broadband access from ILECs, CLECs and cable providers....[p. 26]

Further, EarthLink reveals that many, if not most, of its subscriber additions are being generated over alternative broadband platforms:

> We have a marketing relationship with Sprint Corporation ("Sprint"). During the years ended December 31, 2002 and 2003, our relationship with Sprint generated approximately 10% of EarthLink's total gross organic subscriber additions....
>
> We have an agreement with Time Warner Cable and Bright House Networks, companies whose networks pass more than 22 million homes, to offer our broadband Internet services over their systems. In connection with the agreement, Time Warner Cable and Bright House Networks receive compensation from EarthLink for carrying the EarthLink service and related Internet traffic. In the third quarter of 2001, we started providing services to subscribers via these networks, and as of June 30, 2002, our full package of high-speed Internet access, content, applications and functionality was available in all 39 markets served. As of December 31, 2003, more than 20% of our broadband subscribers were serviced via either the Time Warner Cable or Bright House Networks network. [p. 17]

Indeed, while EarthLink's 10-K reveals healthy year-over-year growth in its broadband subscriber base, the overall percentage of its broadband subscribers within BellSouth's region being served via BellSouth's services has steadily declined. As of the end of 2003, BellSouth estimates that no more than half of EarthLink's broadband subscriber base within BellSouth's service area is being served via BellSouth's enhanced DSL-based service offering. And as discussed above, EarthLink does not even use the *Computer Inquiry*-mandated basic transmission to serve any of its subscribers in BellSouth's service area.

Further, EarthLink claims that "many consumers have broadband access only through DSL, and that even a duopoly of providers does not make a competitive market."[8] Finally, EarthLink states that "while it and other companies are working alternative means of access such as powerline communications, these are not yet a viable market reality."[9] EarthLink's assertions do not provide an accurate picture of the marketplace or EarthLink's own efforts to obtain and use multiple wireline, cable and wireless transmission platforms for its narrow band and high-speed services. EarthLink

---

[8] *Id.* at 2.
[9] *Id.*

provides a more complete and more accurate assessment of the market in its recent 10K filing:

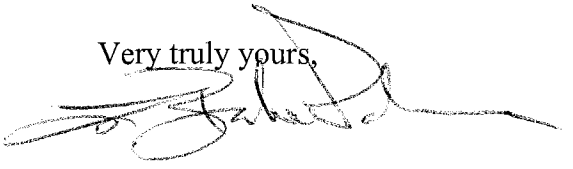
> We have established a national broadband footprint via multiple wholesale vendors, enabling us to deploy digital subscriber line ("DSL"), cable, fixed wireless and/or satellite broadband solutions in multiple markets throughout the U.S. We believe the broadband market will continue to grow, and we will continue our efforts to expand our broadband footprint by pursuing new partnerships and relationships with wholesale broadband providers. We are also exploring the commercial feasibility of emerging alternative broadband access technologies, including power line, fixed wireless or other non-terrestrial based means of access, to expand our broadband footprint and/or deliver broadband services more cost effectively. [p. 1]

As is apparent from its 10-K filing, it continues to be impossible to square EarthLink's advocacy before this Commission with its activity in the competitive marketplace. EarthLink has numerous Internet access alternatives from which to choose and an expanding broadband subscriber base that it successfully leverages in negotiations for Internet access services. Indeed, EarthLink does not even purchase the basic tariffed transmission generated by the regulatory regime that it attempts to defend, while its reliance upon BellSouth's Internet access services continues to diminish with each passing year.

The Commission should finally recognize the fact that "intensity of competition" produces the "significant declines in pricing" for EarthLink through the introduction of innovative, non-regulated wholesale service arrangements like the one that it has entered with BellSouth. Eliminating the outdated *Computer Inquiry* and Title II regulation of wireline broadband services and their cost of compliance will generate enormous benefits to the public through better quality services, more competitive alternatives, further deployment and lower prices.

For all of these additional reasons, BellSouth requests that the Commission finally end *Computer Inquiry* and Title II regulation of its broadband services.

Very truly yours,



L. Barbee Ponder IV

LBPIV:kjw
Attachment

533711

cc: Christopher Libertelli
Matthew Brill
Dan Gonzalez
Scott Bergmann
Jessica Rosenworcel
Robert Pepper
Jeffery Carlisle
Carol Mattey
Jane Jackson
Michelle Carey
Tom Navin
Brent Olson
Robert Tanner
Jeremy Miller
Michael Carowitz
John Rogovin
John Stanley
Jeff Dygert
Jacob Lewis
Barbara Esbin
Eric Bash
John Norton
Alison Greenwald
Darryl Cooper