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May 28, 2004

VIA ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
Room TW-A325
445 12th St., S.W.
Washington, D.C. 20554

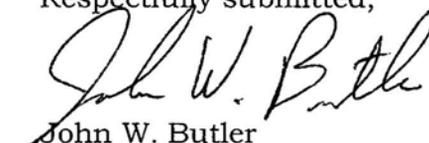
Re: In the Matter of: Petition of SBC Communications
Inc. for Forbearance from the Application of Title II
Common Carrier Regulation to IP Platform Services;
WC Docket No. 04-29

Dear Ms. Dortch:

Please find attached the comments of EarthLink, Inc. to be filed in the above-referenced proceeding.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,


John W. Butler
Counsel for EarthLink, Inc.

JWB:jmb

cc: Counsel for SBC Communications, Inc.
(via first class mail)

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

Petition of SBC Communications Inc.
For Forbearance from the Application
of Title II Common Carrier Regulation
to IP Platform Services

WC Docket No. 04-29

OPPOSITION OF EARTHLINK, INC.

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OPPOSITION OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys, hereby opposes the “Petition of SBC Communications Inc. for Forbearance” (Feb. 5, 2004) (the “Petition”).¹ As discussed in more detail below, the Petition fails on all counts to meet the three-prong test for forbearance. The public interest, consumers’ interests, and the promotion of competition all demand that “IP Platforms” remain open to competition under Title II and the FCC’s *Computer Inquiry* precedent.

INTRODUCTION & SUMMARY

EarthLink is one of the nation’s leading Internet information service providers (“ISPs”), with approximately 5.3 million customers, of which approximately 1.2 million are broadband customers. As a competitor in the information services marketplace, EarthLink has a fundamental interest in this proceeding. This proceeding, among others, will determine whether competitive ISPs will continue to succeed in offering innovative, diverse information services, or

¹ “Petition of SBC Communications Inc. for Forbearance,” WC Dkt. No. 04-29 (Feb. 5, 2004); “Wireline Competition Bureau Extends Comment Deadlines for SBC’s ‘IP Platform Services’ Forbearance Petition,” DA 04-899 (rel. March 30, 2004).

whether the only providers of information services will be vertically integrated platform owners. For competitors like EarthLink that do not own transmission networks, the right to obtain transmission service is essential. If the FCC grants the forbearance SBC seeks here, then the “very, very best and biggest breakthrough in our ambitions and dreams”² will never happen.

The Petition is wrong on both policy and law. Indeed, the Petition is so vague that it offers no clear definition for the so-called “IP Platform” market, much less any data upon which to assess the level of competition in such a market today. It fails to identify geographic and product markets; fails to support (incorrect) factual conclusions; fails to identify alleged regulatory uncertainty purportedly affecting such markets; and fails to comport with relevant forbearance requirements. The Petition, instead, appears based on the mistaken premise that the facilities of and the transmission services offered over the “IP Platform” should be treated the same as the IP-based information services which ride on that platform. The IP platform here, however, includes incumbent LEC and other common carrier facilities and so is subject to §201 and §202 of the Act and *Computer Inquiry* precedent, and must remain so.

The Petition fails to meet the three-prong Section 10 standard because it does not address the facts of the “IP Platform” as described in the Petition. The Petition, instead, seeks to curtail competition from ISPs and competitive local exchange carriers (“LECs”) by giving the IP Platform owner carte blanche to engage in unjust and unreasonable practices and unreasonably discriminatory rates and terms for access. While this Commission has expressly declined to do so even in competitive markets, SBC asks for complete forbearance from Sections 201 and 202 and exemption from competitors’ rights to pursue remedies for anticompetitive conduct through the FCC’s formal complaint process. In other words, the Petition would foreclose the

² Communications Daily (May 5, 2004) (Chairman Powell describing IP services).

Commission from taking any action to ensure just and reasonable rates in the burgeoning IP services market.

The result would surely mean harm to consumers in the form of higher retail rates and less diversity of services to choose from. Consumers will not enjoy the same service choices as they do today, since platform owners like SBC will be able to restrict the terms of access so as to eliminate competitors completely, or to allow only those competitors that do not threaten the network owner's revenues or market plans. Without competition (and with no regulation), consumer prices are likely to rise while innovation in products and services, as well as customer service, will suffer. This is not what Congress intended in creating the public interest test for forbearance. The public interest is best served by keeping transmission platforms open to all information service providers.

Finally, the Petition requests actions that exceed the scope of the Commission's authority under Section 10. First, the Petition asks the Commission to promulgate a host of regulations under Title I authority, but rulemaking is not an appropriate function under Section 10. Second, Section 251(g) of the Act specifies that, if it determines to supercede Title II and *Computer Inquiry* access obligations, the Commission must act through the rulemaking process and not by forbearance.

DISCUSSION

I. THE PETITION IS TOO VAGUE TO EVALUATE ADEQUATELY ON THE MERITS.

FCC precedent demands that forbearance petitions provide the specific factual and legal bases for forbearance action, but the instant Petition fails this basic test. As the Commission held in the *Fixed Wireless Forbearance Order*:³

³ *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd. 17414, ¶ 13 (2000) ("*Fixed Wireless*

‘the decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met.’ We therefore cannot forbear in the absence of a record that will permit us to determine that each of the tests set forth in Section 10 is satisfied for a specific statutory or regulatory provision.

Indeed, the Commission has granted forbearance only where relevant and “hard” market data unequivocally support such regulatory action.⁴

The Petition, however, is far too vague for the FCC to act as requested. It fails to identify with specificity the services that would be subject to the proposed forbearance, fails to provide an adequate description of the network facilities and services that are encompassed in the term “IP Platform,”⁵ fails to enunciate the statutory provisions and regulations from which the FCC would forbear, and, for each such law, fails to apply and meet the Section 10 three-prong standards. The Petition suffers from the same defects as were identified in the *Special Access*

Forbearance Order”) (internal citations omitted). See also, *In the Matter of Amendment of the Commission's Rules Concerning Maritime Communications*, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd. 19853, ¶ 55 (1998) (request for forbearance from Title II common carrier obligations “cannot be granted because it is too vague, both as to the specific provisions from which we should forbear from enforcing, and as to why forbearance would be in the public interest.”).

⁴ *In the Matter of Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of US WEST Communications, Inc. for Forbearance*, Memorandum Opinion and Order, 14 FCC Rcd. 16252, ¶ 33 (1999) (forbearance petition granted upon specific evidence of substantial market competition) (“*US West NDA Order*”).

⁵ In the associated “Petition of SBC Communications Inc. for a Declaratory Ruling” at 28 (dated Feb. 5, 2004) (“*DR Request*”), SBC defines “IP platform services” as “(a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format.” The *DR Request* (at 10) also states “[t]he IP platform is an overlay network, consisting of its own routers and IP-enabled facilities”

Forbearance Order,⁶ where the Commission rejected forbearance because “[t]he BOC petitioners must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate, the BOC petitioners’ claims.” Indeed, in this case, SBC has provided far less than what was deemed inadequate in the *Special Access Forbearance Order*.⁷

Furthermore, contrary to the statutory command that forbearance be based on an analysis of the relevant “geographic markets,”⁸ the Petition fails to identify the relevant geographic and product markets of “IP services” and the “IP platform.”⁹ Instead, the Petition (at 5) rests on the proposition that all providers are nondominant in the “market for IP platform services” but it provides not a shred of data or objective analysis to support this conclusion. Similarly, the Petition (at 6) fails to support the factual premise that “competition has developed and markets are open,” or that “the market for IP platform services is already highly competitive and operates pursuant to cooperative business arrangements.”¹⁰ Lacking such basic economic data, the Petition (at 8) instead posits unfounded doomsday scenarios, including the theory that “[s]electing some IP platform services for regulation would then lead to regulation of the Internet

⁶ *Petition of US West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 14 FCC Rcd. 19947 ¶ 25 (1999) (“*Special Access Forbearance Order*”), reversed and remanded on other grounds, *AT&T v. FCC*, 236 F.3d 729 (D.C. Cir. 2001).

⁷ Specifically, the *Special Access Forbearance Order* rejected an economic report of the BOCs because it did not adequately reveal the underlying data upon which the report was based. In this case, the Petition does not even purport to offer an economic analysis of the market.

⁸ 47 U.S.C. § 10(a).

⁹ *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, n.66 (1998) (“*PCIA Forbearance Order*”) (FCC rejects forbearance where “[t]he record does not contain a market analysis of competition within particular geographic markets with respect to any of the requests for forbearance.”).

as a whole.” Such wild claims are contradicted by the fact of current and ongoing Title II access regulation of common carrier facilities and services which has facilitated rather than inhibited the competitive success of today’s Internet services.

Finally, the Petition fails to provide any specific evidence that basic Title II regulation would harm carriers’ ability to compete in the marketplace or dampen incentives to invest in any significant manner. It is, no doubt, in the self-interests of SBC and other carriers to avoid regulation. The distinct question for the Commission to decide, however, is whether the benefits of regulation, including the benefits of competition from access regulation, are outweighed by specific and quantified regulatory costs and harms. The Petition utterly fails to demonstrate that this balance clearly tips in favor of deregulation. Instead, the Petition (at 2-4) rests primarily on a purported need for “regulatory certainty.” The fact is, however, there is ample certainty today. All telecommunications carriers are under a continuing statutory obligation to offer telecommunications services to ISPs such as EarthLink.

II. THE PETITION FAILS TO SHOW THAT, ABSENT §201 AND §202 REGULATION, CHARGES WILL BE JUST AND REASONABLE AND SBC WILL NOT ENGAGE IN UNREASONABLE AND UNJUST DISCRIMINATION.

The first prong of the Section 10 forbearance test requires the petitioner to demonstrate that “enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications . . . with that . . . telecommunications service . . . are just and reasonable and are not unjustly or unreasonably discriminatory.”¹¹ The Petition provides no assurance of just and reasonable rates nor does it explain how unjust and unreasonable discrimination against ISPs and competitive LECs will not occur.

¹⁰ *Id.* at 11.

¹¹ 47 U.S.C. § 160(a)(1).

A. SBC's Control over Telecommunications Services Necessary to the "IP Platform" Means that SBC Has the Incentive and Ability to Raise Prices Unreasonably and/or Discriminate Absent Appropriate Title II Regulation.

FCC statistics show that incumbent LECs continue to dominate the provision of last-mile telecommunications services in the U.S. For example, incumbent LECs provision approximately 92% of all loops and receive approximately 88% of all revenues of local service providers in the U.S.¹² Further, incumbent LECs own approximately 96.6% of the end-user lines in the U.S., with only 3.4% of end-user switched access lines offered over competitive LEC-owned loops.¹³ In the broadband marketplace, the statistics demonstrate the incumbent LECs enjoy market power as either the monopoly or duopoly provider. For example, as of June 30, 2003, ADSL and cable accounted for 91.0% of all high-speed lines in the U.S. and accounted for 97.3% of all high speed lines in the residential and small business market.¹⁴ Of those ADSL lines, incumbent LECs have a 94.6% market share, with competitive LECs accounting for only 5.4%.¹⁵ Indeed, market power in broadband is a significant and continuing issue: Commission statistics show that 16.4% of U.S. zip codes are served by just one provider and another 16.9% are served by just two providers.¹⁶ In California, "SBC, and other incumbent LECs, continue to be the sole

¹² FCC Statistics of Communications Common Carriers, Table 5.1 – Total USF Loops for all Local Exchange Companies, and Table 5.13 – Gross Revenues Reported by Type of Carrier (rel. March 2, 2004).

¹³ FCC Local Telephone Competition: Status as of June 30, 2003, at 1 (rel. Dec. 22, 2003). The FCC data shows that 14.7% of the total end-user access lines are provided by competitive LECs and, of those, only 23% of lines are competitive LEC owned. Thus, only 3.4% of end-user lines are CLEC owned ($0.23 \times .147 = .034$).

¹⁴ FCC High Speed Services for Internet Access: Status as of June 30, 2003, Table 1 – High Speed Lines and Table 3 – Residential and Small Business High Speed Lines (rel. Dec. 2003) (Cable and ADSL accounted for 91.0% of total high speed lines and for 97.3% of all high speed lines in the residential and small business market).

¹⁵ *Id.*, Table 5 – High-Speed Lines by Type of Provider as of June 30, 2003.

¹⁶ *Id.*, at Table 12 – Percentage of Zip Codes With High-Speed Lines In Service.

providers of broadband transmission service to nearly half of all residential customers in the state who have access to broadband service.”¹⁷

Nor can the incumbent LECs claim a non-dominant position in this monopoly/duopoly. A recent study by the Leichtman Research Group shows that incumbent LEC ADSL adds actually exceeded net adds for cable for the First Quarter, 2004.¹⁸ Recent evidence from the Pew Internet & American Life Project confirms that “DSL now has a 42% share of the home broadband market” compared with cable’s 54% share.¹⁹ According to the FCC, SBC’s ADSL in California actually leads cable in market share: ADSL has 49.6% and cable has 40.4% of the market for high-speed lines.²⁰ According to the Pew Study, all other providers, including fixed-satellite and wireless, captured just 3% of the market. The Pew Study (at 6) also confirms the FCC data that 17% of consumers are served by just one last mile broadband provider. Thus, incumbent LECs are now roughly equal partners in the broadband duopoly/monopoly. With the exception of compliance with a few narrow merger-related requirements, of course, cable companies have to date generally refused to comply with their Section 201 and 202 obligations with respect to transmission services underlying the information services that they offer to the public for a fee. Thus, cable offers essentially no competition in the market for broadband transmission services sold to independent information service providers.

¹⁷ Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Docket Nos. 02-33, 95-20, 98-10, at 2 (filed July 1, 2003).

¹⁸ “A Record 2.3 Million Add Broadband in First Quarter of 2004,” Leichtman Research Group Press Release (May 11, 2004) (attached hereto). This study also confirms that Covad, the only competitive provider of broadband among top twenty providers, has approximately 5.3% of the ADSL market share. *Id.*

¹⁹ Pew Internet Project Data Memo, at 2 (April 2004), *found at* <http://www.pewinternet.org/reports/reports.asp?Report=120&Section=ReportLevel1&Field=Level1ID&ID=505>.

As the Commission has previously explained, the incumbent provider's network necessarily includes ownership of the last-mile access facilities, ownership of the central office and office space/collocation facilities, and interoffice transport facilities.²¹ As described by SBC, all of these network components would be essential parts of the "IP Platform." Thus, there can be no legitimate claim that the "IP Platform" is not susceptible to discrimination and abuse in the absence of regulation.

Clear FCC precedent rejects forbearance except in cases of clear and substantiated evidence of a robust competitive market²² and where the incumbent lacks any bottleneck control

²⁰ *FCC High Speed Services for Internet Access: Status as of June 30, 2003*, Table 7 – High-Speed Lines By Technology as of June 30, 2003 (rel. Dec. 2003).

²¹ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd. 15435 (2001) (the "obligation imposed on incumbents to allow for the collocation of competitors' equipment at the incumbents' premises is a critical, if not fundamental, component of this equation. Without mandatory collocation rights, competitors would not be able to achieve direct access to incumbent bottleneck facilities, and competitors would be thwarted in their ability to deploy alternative, innovative technologies. Such a result would significantly diminish one of the bedrock principles of the 1996 Act - the promotion of competition to spur infrastructure investment and technological innovation."); *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978, ¶¶ 386-393 (2003), partially vacated and remanded, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (FCC finds impairment of DS3 and DS1 interoffice transport due to barriers to entry).

²² *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum Opinion and Order, 14 FCC Rcd 10840 (1999) ("*ITTA Cost Support Order*") (incumbent LECs failed to meet first prong of Section 10 forbearance standard where incumbents did not demonstrate that they face "substantial competition"); see also, *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Third Memorandum Opinion and Order, 14 FCC Rcd. 10816, ¶ 12 (1999) (first prong of Section 10 forbearance test not met where "independent LECs have sufficient ability through their control of bottleneck facilities to harm the in-region long distance services market by engaging in cost misallocation, access discrimination, and price squeeze."); *In the Matter of 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers; United States Telephone Association's Petition for Forbearance from Depreciation Regulation of Price Cap Local Exchange Carriers*, Report and Order in CC Docket No. 98-137 Memorandum Opinion and Order in ADS 98-91, 15 FCC Rcd. 242, ¶ 54 (1999) (Under first prong of forbearance test, incumbent LECs failed to "demonstrate[] that the local exchange market is sufficiently competitive" to warrant forbearance).

over the services in question.²³ As the Commission has explained, “[i]n order to satisfy the first prong of the three-part forbearance analysis, the BOC petitioners must make a *prima facie* showing that sufficient competition exists so that application of the Commission's rate level, tariffing, and rate structure rules is not necessary to ensure that the BOC petitioners' rates and practices for the services in question are just, reasonable, and not unreasonably discriminatory.”²⁴ Notably, the Commission has never granted a carrier forbearance from Section 201 and 202 of the Act. Even in the face of a substantially competitive wireless market, the FCC has consistently rejected requests for forbearance from “bedrock” §§ 201 and 202 obligations.²⁵

Indeed, given the nascence of the IP services market, it is especially important for the Commission to use its Section 10 powers judiciously and with caution towards providers like SBC that currently control essential network facilities. While a plethora of IP-based information services are burgeoning, Section 10 forbearance is permanent for all practical purposes upon this emerging marketplace. A precipitous regulatory action that, for example, effectively denies access to transmission services for the vast majority of participants in the marketplace could well be devastating and irreversible.

To grant SBC and other facilities-based carriers unregulated control of the essential transmission components of IP services would also lead to discriminatory and strategic pricing

²³ *In the Matter of Petition of SBC Communications Inc for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Nonlocal Directory Assistance Services*, Memorandum Opinion and Order, 18 FCC Rcd. 8134, ¶ 13 (2003) (“*SBC NDA Order*”) (NDA forbearance granted only where there was evidence of substantial competition and evidence that BOC “does not exercise monopoly power over the components” of the service).

²⁴ *Special Access Forbearance Order* ¶ 32.

²⁵ *PCIA Forbearance Order* ¶ 23 (Commission declines to forbear from Sections 201 and 202 of the Communications Act even “[a]ssuming all relevant product and geographic markets become substantially

decisions between the competitive and noncompetitive aspects of the provider's operations to the detriment of competition and nondiscriminatory access to services and unbundled network elements.²⁶ Rather than offer any means by which the Commission would monitor or protect against such unreasonable cross-subsidies, SBC's Petition proceeds from the erroneous assumption that such issues would not arise. Unfortunately, experience is to the contrary.

Moreover, the assertion of the Petition (at 5) that "competitive parity will be sustained going forward by the nature of the Internet itself, whose open-standards-based architecture lowers barriers to entry" is unsupported and false. The Internet thrives because the underlying transmission networks and standards are open, but, at least as far as the incumbent LEC network, that has been the case only because regulation has required such openness. SBC seeks in this Petition the right to close its network, to discriminate among ISPs and between services offered by ISPs, which is contrary to the fundamentally open architecture of the Internet and contrary to Section 10(a)(1) of the Act.

Finally, ISP competition and competitive LEC competition would be severely harmed if competitors had no recourse to the FCC's Section 208 formal complaint process and the bedrock substantive law of Sections 201 and 202 protecting against unjust and unreasonable practices. Indeed, the FCC has consistently rejected or conditioned incumbent LEC requests for forbearance from Title II regulation where, as here, such deregulation "would hamper our [FCC's] ability to ensure just and reasonable rates."²⁷ Without resort to the FCC's adjudicatory

competitive," because "carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner."); *Fixed Wireless Forbearance Order* ¶ 20 (same).

²⁶ *USTA Depreciation Order* ¶ 53 (forbearance is contrary to nondiscrimination requirement of Section 10(a)(1) where it would permit incumbent LEC "to increase the cost of bottleneck network components that competitors would require, while simultaneously reducing the costs of other network components that underlie the incumbent LEC competitive services but are not used by competitors").

²⁷ *USTA Depreciation Order* ¶ 56.

processes in the event of serious anticompetitive practices, the FCC would completely abdicate its responsibilities under the Act at a time when, just recently, the U.S. Supreme Court has recognized in *Verizon v. Trinko* “the significance of regulation” under the Communications Act to act as an “effective steward for the antitrust function.”²⁸

B. SBC’s Claim that the “Legacy” Network Will Still be Available to Competitive LECs and ISPs is Meaningless.

The Petition (at 9) attempts to assuage concerns regarding the lack of bedrock Title II principles by asserting that the radical forbearance proposed would “have no effect on rights of access to legacy, non-IP-based services and certain of the facilities that support them.” This claim is meaningless.

First, it is meaningless because there is no separate “IP Platform” that is distinct from a “legacy platform.” The “IP Platform” of routers and facilities vaguely referenced in the Petition is used in conjunction with facilities (loops, collocation, interoffice facilities) to offer an “IP Platform” service. Thus, denial of Title II and *Computer Inquiry* access to so-called IP platform services effectively means denial of access to essential transmission facilities.

Second, the Petition appears to propose to eradicate almost all significant Title II obligations on carriers such as SBC that would promote information service provider competition. For example, SBC would have the Commission reverse course on the promotion of information service competition and, instead, deny Title II and *Computer Inquiry* access to the incumbent’s DSL network services because, according to SBC, “[b]roadband Internet access service is yet another example of an IP platform service.”²⁹ Indeed, while the Petition (at 9-10) contends that “the only DSL transport that would receive unregulated treatment is a DSL

²⁸ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 881-882 (2004).

²⁹ *DR Request*, at 32 n. 63.

transport functionality that . . . allows the customer to send or receive communications in IP format,” it is difficult to imagine DSL transport that does not allow such IP communications. Similarly puzzling are the assertions that common carriage would continue only for “non-IP-enabled frame relay and ATM services” and that *Computer Inquiry* would apply only for “non-IP-based information services.” Petition at 9. Given that IP is a standard protocol for all Internet communications, the forbearance sought by the Petition would swallow up virtually all information services and data transport services offered today.

Third, the Petition has not and cannot show that independent ISPs today have a robustly competitive market from which to obtain transmission to provide the public with their broadband-based information services. According to the FCC’s most recent statistics described above in Section II.A, the local telecommunications marketplace is far less than competitive. That fact, coupled with the fact that, with a few limited exceptions, cable operators do not provide transmission supporting information service by independent providers, demonstrates that there simply is very little competition in the relevant market.

Finally, the objective of promoting information services competition, which forms the basis of Title II and related *Computer Inquiry* regulation, is not today and has never been technology dependent.³⁰ Indeed, the FCC should reaffirm that principles of robust information services competition “should be ‘technology neutral’ – that is, while such competition is implemented through particular technologies and different underlying physical networks, its principles do not depend on one or another such implementation. Rather, those principles can be

³⁰ *In the Matter of Amendment of Section 64.702 of the Commission’s Rules (Third Computer Inquiry)*, Report and Order, 104 F.C.C. 2d 958 ¶ 158 (1986) (subsequent history omitted) (“*Computer IIP*”) (BOCs must offer “basic services and basic service functions that underlie the carrier’s enhanced service offering”); *In the Matter of Independent Data Communications Manufacturers Association, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd. 13717, (Packet-switching frame relay service is a “basic service” under *Computer II*) (“*AT&T Frame Relay Order*”).

applied to evolving network technologies as they develop.”³¹ IP is just a transmission protocol processing standard used by telecommunications carriers, including the BOCs, cable companies and others.³² Nothing about this technological development should exempt either the physical networks or the transmission services riding on those networks from basic common carrier obligations. There is good reason for this sound policy and law: it establishes a neutral platform by which a panoply of competing ISPs can offer diverse and innovative services.³³ To achieve these public benefits, access obligations should be retained and should not be confined to some narrow subset of non IP-based telecommunications services.

III. REGULATION IS NECESSARY FOR THE PROTECTION OF CONSUMERS

Section 10(a)(2) of the Act requires the petitioner to demonstrate that “enforcement of such regulation or provision is not necessary for the protection of consumers.”³⁴ With control over essential network access and the ability to impede unfettered competition for IP services, however, the relief SBC seeks would affect consumers adversely in several ways. For example, network operators could charge rates for IP services in excess of those that would be tolerated under a fully competitive market. To sustain such rates, transmission providers are also likely to charge rates that “raise rivals’ costs,” such as charging excessive wholesale rates to ISPs and excessive rates to competitive LECs for collocation and unbundled network elements, which

³¹ *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd. 1, n. 12 (1988).

³² As the Commission explained nearly twenty years ago, “the purpose of protocol processing is to provide a subscriber with the equivalent of a transparent, error-free, communications path for the information content of a subscriber’s transmission.” *Computer III* ¶ 296.

³³ *AT&T Frame Relay Order* ¶ 35 (*Computer Inquiry* “access allows competing enhanced service providers to more easily enter and compete in the market for such technologies. Thus, under the Computer II and Computer III decisions, competitive access has promoted the public interest by accelerating the development of emerging technologies such as frame relay.”); *Computer III* ¶ 149 (*Computer III* access “will increase the public welfare by maximizing the availability of enhanced services to the public.”).

further harms consumers of information services. The Commission has previously recognized that a lack of robust price competition may lead to rates that are excessive and that harm consumers.³⁵

Incumbent LECs are sure to argue, of course, that cable competition provides sufficient price discipline, but it is highly questionable whether a duopoly (at best) does, in fact, mimic the price discipline of a robustly competitive market. As the D.C. Circuit recently observed, “[i]n a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger.”³⁶ More directly to the point, cable companies today provide virtually no source of competition in the market for transmission sold to independent ISPs, because they have largely refused to provide such service except where ordered to do so in connection with merger proceedings.

Further, even with intermodal competition, such as it exists today, facilities-based providers can deny consumers the benefits of intramodal competition, including price competition and diversity of services across the same provider’s platform. Price squeeze, for example, or unreasonable restrictions on the services that competitors may offer also are strategies that can inhibit intramodal competition which, in turn, stifle competitive choices for consumers. Without the backstop of a potential Section 208 complaint and the Section 201 and 202 bedrock protections, these strategies are sure to emerge with regard to the IP platform.

³⁴ 47 U.S.C. § 160(a)(2).

³⁵ *USTA Depreciation Order* ¶ 59 (consumers would not be adequately protected where forbearance “could potentially trigger large increases in consumer rates . . . for many years until robust competition curtails the ability of the incumbent LECs to secure these rates from consumers.”); *Special Access Forbearance Order* ¶ 34 (“Absent a sufficient showing of competition, it is clear that regulation of the BOC petitioners’ special access and high capacity dedicated transport services is necessary to protect consumers.”).

³⁶ *FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001).

As noted, facilities-based providers' ability to cross-subsidize between regulated services and unregulated IP services would also adversely impact consumers' rates for regulated services, and yet the Petition provides no explanation as to how the Commission would protect the consumers from this harm. The Commission has explained that cross subsidy can also harm consumer choices in the unregulated market, and so Title II cost allocation rules are a necessary safeguard against "improperly shifting costs from unregulated to regulated offerings" that "can have adverse impacts ... on competition in unregulated markets, by providing an opportunity for carriers to charge artificially low prices for their unregulated goods and services."³⁷ Given the intention of some carriers to keep the costs of Title I services as "regulated" for accounting purposes only,³⁸ the risk of cross-subsidy is especially great.

Finally, without the Title II and Section 208 formal complaint processes, the resolution of consumer complaints without any statutory enforcement mechanism or regulatory procedures is likely to entail significant administrative costs for both the FCC and consumers.³⁹ The Petition, however, offers no plan for state and federal regulators to address the range of consumer complaints -- including slamming, service quality, truth-in-billing, cramming, CPNI, and others -- that are sure to follow from the offering of a wide array of IP platform services over unregulated carrier facilities, including voice, data, and video.

³⁷ *In the Matter of Amendment of Section 64.702 of the Commission's Rules (Third Computer Inquiry)*, Report and Order, 104 F.C.C. 2d 958 ¶ 234 (1986) (subsequent history omitted).

³⁸ Letter from Stephen Ernest, BellSouth Corporation, to Magalie Salas, Secretary, FCC, CC Dkt. No.02-33 (Aug. 26, 2003) ; Letter from R Scott Randolph, Verizon Communications, to Carol Matthey, Deputy Bureau Chief, Wireline Competition Bureau, CC Dkt. No.s 02-33, 95-20 and 98-10 (June 26, 2003).

³⁹ USTA Depreciation Order ¶ 58 (forbearance rejected where it would lead to "administrative and regulatory expenses because of contentious and protracted case-by-case reviews").

IV. THE PROPOSED IP PLATFORM FORBEARANCE IS NOT IN THE PUBLIC INTEREST.

Section 10(a)(3) of the Act requires a petitioner to demonstrate that “forbearance from applying such provision or regulation is consistent with the public interest.”⁴⁰ In this case, however, forbearance from Sections 201 and 202 and *Computer Inquiry* rules would be contrary to the public interest because it would undermine ISP and telecommunications service competition. Given the current lack of competition in the local access market and the experience with incumbent LEC practices even with regulation, the proposed deregulation of access to essential facilities and services would almost certainly result in unjust, unreasonable and unreasonably discriminatory treatment for ISPs, including excessive costs for access. As the Commission has noted, “where the potential result is higher rates . . .” than under Title II regulation, forbearance “is not in the public interest.”⁴¹

Aside from the ability to raise rival ISP costs by charging exorbitant access rates, facilities-based providers could also restrict services that ISPs may offer across the IP platform, such as voice offerings, video services, or particular data-based applications, which compete with the provider’s own retail offerings.⁴² This, in turn, harms the public interest by denying consumers the diversity of service offerings from a wide variety of competing ISPs and competitive carriers, making public access to such advanced services more expensive and less diverse than it would be under either a regulated or genuinely competitive environment.

⁴⁰ 47 U.S.C. § 160(a)(3).

⁴¹ *USTA Depreciation Order* ¶ 63.

⁴² *Special Access Forbearance Order* ¶34 (“because the BOC petitioners have failed to show that competition will constrain anti-competitive conduct by them, the public interest is best served by continued regulation of special access and high capacity dedicated transport services which is designed to foster competition for these services.”).

Moreover, under a Section 10(b) analysis, the forbearance requested here would harm “competitive market conditions” and thwart “competition among providers of telecommunications services.”⁴³ For example, competitive providers would presumably be denied Section 251 and Section 201 access to the underlying network elements of the “IP Platform” services. As the Commission has explained, where “the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets, we cannot find that forbearance would promote competitive market conditions.”⁴⁴

Further, contrary to what SBC suggests, the goals of Section 706 of the Act would be defeated by the requested forbearance because consumers will not have the full benefits of intramodal competition, i.e., competitive pricing and diverse advanced service offerings. As the Commission has noted for the promotion of advanced services across the DSL platform:

The Commission’s determination herein should encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price. In turn, the Internet Service Providers, as unregulated information service providers, will be able to package the DSL service with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services.⁴⁵

Section 706 demands that the Commission again ensure that vibrant and open intramodal competition remains the hallmark for all IP platform services.

V. THE PETITION REQUESTS ACTION THAT EXCEEDS THE SCOPE OF SECTION 10 FORBEARANCE.

In two ways, the Petition requests Commission action that is contrary to the role of Section 10 forbearance under the Act.

⁴³ 47 U.S.C. §160(b).

⁴⁴ *Depreciation Forbearance Order* ¶ 63.

⁴⁵ *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 3 (1999).

First, while the Petition (at 2) suggests the Commission could buffer its proposed anti-consumer forbearance by enacting Title I regulation for “public policy objectives such as universal service, public safety/911, communications assistance for law enforcement, and disabilities access,” it is clear that SBC’s request is beyond the scope of a Section 10 proceeding. As the Commission has previously explained, forbearance cannot be misused to substitute new rules for existing rules.⁴⁶ Among other reasons, this Section 10 proceeding is an improper forum for the FCC to promulgate Title I rules because the Commission must adhere to Section 553 of the APA and to FCC procedural requirements.⁴⁷ Similarly, to the extent that the Petition seeks to exempt IP Platform services from the Commission’s Part 36 jurisdictional separations rules, this cannot be accomplished without referring the matter to the Federal-State Joint Board.⁴⁸ This referral would be especially important in this case, since the Petition proposes to deregulate interstate and intrastate voice services⁴⁹ and it would presumably employ facilities that are used jointly for both intrastate and interstate communications. Because Title I regulation for “public policy objectives” cannot be accomplished in this proceeding, grant of the Petition would be a bare deregulatory grab for SBC at the expense of the public interest.

Second, Section 251(g) of the Act prevents the Commission from removing ISP access rights in this forbearance proceeding. Section 251(g) of the Act provides that:

⁴⁶ *In the Matter of New England Telephone and Telegraph Company and New York Telephone Company Petition for Forbearance From Jurisdictional Separations Rules*, Order, 12 FCC Rcd 2308, ¶ 12 (1997) (“We deny NYNEX’s petition for forbearance because the relief requested by NYNEX goes beyond mere forbearance from regulation and instead requests that we substantially amend our Part 36 separations rules.”).

⁴⁷ 5 U.S.C. § 553(b) & (c) (agency must publish a notice of proposed rulemaking and request comment from the public prior to adoption of rules); 47 C.F.R. § 1.399, *et seq.*

⁴⁸ 47 U.S.C. § 410(c) (“The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations . . . to a Federal-State Joint Board.”).

each local exchange carrier, to the extent that it provides wireline services, shall provide such exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superceded by regulations prescribed by the Commission after such date of enactment. 47 U.S.C. § 251(g).

The *Computer Inquiry* access obligations extant at the time of the 1996 Act are clearly within the scope of the “information access” obligations of Section 251(g).⁵⁰ These access obligations, therefore, may be superceded only “by regulations prescribed by the Commission.” Since rulemaking is a Commission function that is beyond the scope of a forbearance proceeding, a grant of forbearance of the *Computer Inquiry* access obligations would violate Section 251(g) of the Act.

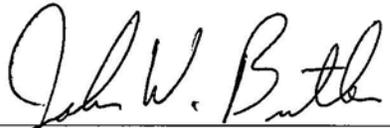
⁴⁹ *DR Request*, at 28 (“The communication may be voice, data, video, or any other form of communication, so long as it is sent to or received by an end user in IP over an IP platform.”).

⁵⁰ *See, In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21095, n. 621 (1996) (“Because the requirement that the BOCs provide ISPs with ‘information access’ under the MFJ is preserved under section 251(g), ISPs will continue to be able to obtain the services they require on a nondiscriminatory basis. 47 U.S.C. § 251(g).”).

CONCLUSION

The Commission should deny the Petition and ensure robust information services competition.

Respectfully submitted,

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