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June 25, 2004

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Dockets Nos. 02-33, 95-20, 98-10.*

*Ex Parte* Filing on Behalf of AT&T Corp.

Dear Ms. Dortch:

I write on behalf of AT&T Corp. (“AT&T”) to address SBC’s Accessible Letter of April 23, 2004, which purports to withdraw its broadband service offered to CLECs to support their DSL service to end users over SBC’s hybrid-fiber loops and to “supersede and replace” that service with a “private carriage” offering providing the same functionalities and to be used for the same purpose.<sup>1</sup> SBC states (at 1, 2) that it “plans to make available” its new offering “to afford interested carriers with access to SBC’s 13-STATE Broadband Architecture for the provision of xDSL-based services.” SBC’s offering is unlawful for multiple reasons set forth below that show that the Commission should require SBC to withdraw its letter and related offering and, more broadly, why the relief it requests in the proceedings noted above is barred by law and contrary to the public interest.

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<sup>1</sup> See SBC Accessible Letter No. CLECALL04-069 on behalf of SBC Illinois, SBC Indiana, SBC Ohio, SBC Michigan, SBC Wisconsin, SBC California, SBC Nevada, SBC Arkansas, SBC Kansas, SBC Missouri, SBC Oklahoma, SBC Texas and SBC Connecticut (filed April 23, 2004) (attached hereto).

June 25, 2004

Page 2

*First*, there is no basis for SBC to assert that the offering amounts to “private carriage” that would be exempt from the requirements of Sections 201(b) and 202(a) and other requirements of Title II of the Communications Act. By the terms of its own letter, SBC’s offer is “ma[d]e available” to all “interested carriers.” In addition, its new offering is expressly designed to “replace and supersede” a common carriage offering that was indisputably subject to Title II. When a carrier holds itself out to undertake business on this basis and makes such a generally available offer, it is operating as a common carrier and for that service is subject to Title II’s requirements.<sup>2</sup> Simply declaring a generally available offer to be one of “private carriage” does not make it so, and any other result would render Title II’s requirements entirely optional.

*Second*, the Commission has no basis to make the requisite public interest determination that would permit SBC to convert a generally available service to a private carriage offering – even assuming that SBC’s own structuring of the new generally available offering did not preclude private carriage here.<sup>4</sup> SBC has, for years, been making a generally available offering to ISPs and CLECs that seek to provide DSL service, and those customers have been operating under the protections afforded by Title II. No basis exists to strip them of those protections, particularly given that SBC is in the overwhelming percentage of cases the sole provider of broadband facilities to ISPs and CLECs. These circumstances present just the risks to competition and consumer welfare that Title II is usually employed to prevent, and thus removing the protections of Title II here would be particularly unjustifiable.

*Third*, SBC provides no basis to conclude that the service it proposes to offer on a private carriage basis differs materially from the wholesale DSL services it offers on a common carriage basis through facilities other than its hybrid-fiber loops. Whether provided over traditional copper loops or hybrid-fiber loops, the service is designed to and in fact does support CLECs’ and ISPs’ provision of DSL services to end users. Because SBC has always provided and continues to provide that service on a generally available basis (indeed, on a tariffed basis), the service is already a common carriage offering. Common carriage is determined in relation to a particular service, not the facility used. *See NARUC I, supra*. Thus, the fact that SBC offers the service over hybrid loops, in addition to copper loops, does not exempt the service from Title II’s requirements with respect to the hybrid facilities.

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<sup>2</sup> *See, e.g., Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 923-25 (D.C. Cir. 1999); *National Ass’n of Regulatory Utility Comm’rs v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976) (“*NARUC I*”).

<sup>4</sup> Two separate and independent bases can require a carrier in SBC’s position to operate as a common carrier: “[A] carrier has to be regulated as a common carrier if it will ‘make capacity available to the public indifferently’ or if ‘the public interest requires common carrier operations of the proposed facility.’” *Virgin Islands Tel. Corp. v. FCC*, 198 F.2d at 924 (quoting *Cable & Wireless PLC*, 12 FCC Rcd. 8516, ¶¶ 14-15 (1997)).

June 25, 2004

Page 3

*Fourth*, other Commission rules and statutory provisions require SBC to provide its broadband offering as a common carrier service on non-discriminatory terms. SBC dramatically misstates the import of the *Triennial Review Order* when it claims (at 1) that the Commission in that order “confirmed that [SBC] has no obligation” to offer a wholesale broadband service over its hybrid-fiber loops. Although the Commission may have found that Section 251(d) does not require SBC to offer a wholesale broadband service over hybrid-fiber loops as UNEs at TELRIC rates, the *Triennial Review Order* does not operate to relieve SBC of its separate obligations under rules established by the Commission’s *Computer Inquiries*. Those rules require SBC to unbundle its basic from enhanced services and offer transmission capability to other enhanced service providers under the same tariffed terms and conditions under which it provides such services to its own enhanced service operations.<sup>5</sup>

*Finally*, SBC has in other contexts committed itself to maintaining its broadband wholesale offering as one that is generally available (and thus a common carriage offering) and to related safeguards that are incompatible with private carriage. When SBC sought and received from the Commission a forbearance determination that relieved SBC of its obligation to tariff its interLATA advanced services offerings, SBC made various commitments regarding its wholesale offerings used to support advanced services, including its wholesale broadband offering designed to be used by ISPs.<sup>6</sup> SBC pledged that it would “post on its website the rates, terms and conditions of any broadband access arrangement that it has entered into with an affiliated ISP” and that “[u]naffiliated ISPs that are similarly situated will be able to take service under these rates, terms, and conditions.”<sup>7</sup> SBC also committed to “post on its website the general rates, terms and conditions for ISP broadband access arrangements that unaffiliated ISPs can opt into.”<sup>8</sup> The Commission granted forbearance relief based on SBC’s continued adherence to these commitments and further stated that “the rates, terms, and conditions under which [SBC’s advanced services affiliate] provides telecommunications services will remain subject to challenge through the section 208 complaint process.”<sup>9</sup> The commitments require that SBC’s broadband wholesale offerings designed for ISPs remain generally available and offered on a non-discriminatory basis. That is, they confirm that SBC will offer such services on a common carrier basis. The commitments do not permit an exception depending upon the particular facilities used to provide them; nor do they distinguish among various broadband wholesale services provided to SBC’s advanced services affiliate. SBC’s commitments not only confirm that the broadband wholesale services at issue here have been and are offered on a common

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<sup>5</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) (subsequent history omitted).

<sup>6</sup> *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Memorandum Opinion and Order*, CC Docket No. 01-337, FCC 02-340 (Dec. 31, 2002).

<sup>7</sup> *Id.* ¶ 11.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* ¶¶ 15, 22.

June 25, 2004

Page 4

carrier basis, but also independently preclude SBC's purported "private carriage" offering.<sup>10</sup>

For the foregoing reasons, the Commission should find that the relief SBC requests in these proceedings is barred by law and contrary to the public interest and should require that SBC withdraw its accessible letter.

Respectfully submitted,

/s/ David L. Lawson

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cc: William Maher  
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<sup>10</sup> SBC's new offering is also unlawful because it contains a restrictive provision that is designed to and has the effect of limiting competition in markets for local telephone services. SBC seeks (at 1) to limit its wholesale service to support DSL service provided only to end users "where [SBC] is providing retail voice service over the same facility to the same end-user customer." That is, SBC will not permit its wholesale service to be used by a CLEC that seeks to purchase the service to use it to offer a bundle of DSL and voice services. Just as importantly, the restriction ensures that SBC will threaten to – and will in fact – terminate a customer's DSL service if the customer selects a voice service provider other than SBC. The tremendous switching costs associated with changing DSL providers ensures that SBC's restrictive provision effectively insulates such customers from local service competition. As AT&T and others have detailed in their comments addressing BellSouth's Docket No. 03-251 petition for preemption of state laws prohibiting this practice, such DSL restrictions have enormous anticompetitive effects in local telephone services markets. *See, e.g.*, Comments of AT&T Corp. and the CompTel/ASCENT Alliance, WC Docket No. 03-251 (filed Jan. 30, 2004).