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September 29, 2004

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 LECs* (CC Docket Nos. 01-338, 96-98, 98-147)

Dear Ms. Dortch:

On September 28, 2004, Dave Baker, Vice President, Law and Policy for EarthLink, Inc., Mark J. O'Connor and the undersigned, both of Lampert & O'Connor, P.C., on behalf of EarthLink, Inc., met with Christopher Libertelli, Senior Legal Advisor to Chairman Powell, and Aaron Goldberger, Legal Advisor to Chairman Powell, to discuss Verizon's request for forbearance from Section 271 unbundling obligations for broadband facilities.

Specifically, EarthLink noted the September 10, 2004, *ex parte* letter of Verizon, which states that its forbearance request does not extend to issues under consideration in other FCC proceedings, including CC Docket Nos. 02-33 and 01-337. EarthLink agreed and urged that the FCC therefore clarify that the current obligations upon the Bell Operating Companies ("BOCs"), including Verizon, to offer non-discriminatory access to information service providers are not affected, and stressed the importance of ensuring that any decision regarding possible forbearance from Section 271 broadband unbundling requirements be consistent with the continuation of these obligations.

EarthLink explained that unlike the unbundling obligations in the Section 251 and 271 contexts, which implicate the UNE rights and responsibilities of carriers, the *Computer Inquiry* obligations require the BOCs to offer basic transmission services in a nondiscriminatory manner via-a-vis their information services. As such, EarthLink stressed that in considering forbearance from Section 271 unbundling obligations for fiber, 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. Further, the factual record relevant for purposes of forbearance in this case is not the retail broadband market, but rather the evidence and economics of fiber deployment by carriers.

■ Lampert & O'Connor, P.C.

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EarthLink further urged the Commission to act on EarthLink's Petition for Reconsideration of the *TRO* decision on line sharing and EarthLink's August 10, 2004, written *ex parte* presentation for interim relief from the October 3rd line sharing deadline. EarthLink pointed out that Covad's temporary line sharing extensions with Verizon and other RBOCs, and the lack of any contractual arrangement with BellSouth, evidence a lack of bargaining power on Covad's part. Furthermore, other data LECs still face an October 3rd cutoff for any new line sharing arrangements. EarthLink also urged the Commission not to grant forbearance from Section 271 for line sharing ordered by state commissions, since such unbundling does not impact the incumbent LEC's fiber facilities.

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: Christopher Libertelli
Aaron Goldberger