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

Dear Ms. Dortch:

This letter is to address the pending forbearance petition of Verizon for relief from Section 271 unbundling obligations as they apply to Verizon's "next generation" network facilities, such as fiber facilities. In EarthLink's view, forbearance is not warranted in this case based upon the record evidence. If forbearance is to be granted, however, the factual findings must relate to the specific relief requested, consistent with the Commission's obligation under Section 10(a)(1) that enforcement of the unbundling obligation would not be necessary to ensure "just and reasonable" rates. In this case, the relevant factual question is whether competing carriers have sufficient access to fiber or fiber capacity, including through self-provisioning, such that Section 271 unbundling is not necessary to ensure "just and reasonable" access for such broadband capacity.

What is not relevant, however, is the distinct market for broadband services sold to end users and Internet service providers. The unbundling obligations in the Section 251 and 271 contexts, which implicate the UNE rights and responsibilities of carriers, and the *Computer Inquiry* obligations that require the BOCs to offer basic transmission services in a nondiscriminatory manner via-a-vis their information services, address two distinct markets and distinct sets of factual considerations. To this extent, EarthLink agrees with 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 considering the state of the broadband services to end users and ISPs, including CC Docket Nos. 02-33 and 01-337.

Moreover, the facts demonstrate that the Commission cannot conclude that the broadband market (as opposed to network elements) faced by end users and ISPs is sufficiently competitive to meet the Section 10(a)(1) "just and reasonable" standard. For example:

- "The record indicates that no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market." *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order, 18 FCC Rcd. 16978, ¶ 233 (2003), *partially vacated on other grounds*, USTA v. FCC, 359 F.3d 554 (2004) ("*TRO*").

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- According to FCC data, fixed wireless and satellite hold insufficient market share (just 1.3%) to be considered serious competition to the incumbent LEC or cable operator in any relevant market.[1]

- Broadband over power lines ("BPL") is not a significant entrant in either retail or wholesale markets.[2] In a May 2004 survey of alternative broadband services, Verizon was able to list only two commercial roll-outs of BPL, at least one of which was not in Verizon territory.[3]

Even if retail cable modem services were included in the relevant market for wholesale broadband transport (which they should not be) and/or providers of retail cable modem services were considered participants in the relevant wholesale broadband transport market (which would

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[1] High-Speed Services for Internet Access: Status as of December 31, 2003, Chart 2 – High-Speed Lines by Technology (rel. June 8, 2004) ("*FCC June 2004 High-Speed Report*"); *see also*, *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order, 18 FCC Rcd. 16978, ¶ 231 (2003), ("*TRO*"), *partially vacated and remanded*, USTA v. FCC, 359 F.3d 554 (D.C. Cir. 2004)("The record indicates that, at present, fixed wireless and satellite services remain nascent technologies, with limited availability, when used to provide broadband services to the mass market.").

[2] *TRO,* ¶ 232 ("Finally, we note that other technologies that can substitute for loops in providing narrowband and broadband service are currently under development. For example, some companies are experimenting with delivering narrowband voice service via power lines. Such technologies have not been deployed beyond an experimental basis (*e.g.*, technical trials) at this time.")(footnote omitted).

[3] "Competition in the Provision of Voice Over IP and Other IP-Enabled Services," CC Dkt. No. 04-36, at A-13 (filed May 28, 2004) (referencing BPL roll-outs in Virginia and Ohio).

also be incorrect), the market still would not be competitive; rather the market so defined is at best a duopoly in which each duopolist holds market power.[4]

- For "a typical local broadband market, the HHI ranges between approximately 5000 and 5400. The above figures indicate that the typical broadband internet market is very highly concentrated."[5]

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[4] "In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger." FTC v. H.J. Heintz, 246 F.3d 708, 724 (D.C. Cir. 2001); *In the Matter of Application of Echostar Communications Corp*., Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 100 ("courts have generally condemned mergers that result in duopoly"), ¶ 103 ("existing antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality") (2002); United States Dept. of Justice Antitrust Div. and Federal Trade Commission, *1992 Horizontal Merger Guidelines,* 57 Fed. Reg. 41552, § 0.1 (1992) (*"Merger Guidelines"*)("where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist . . ."). The Commission has held that "both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market." *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, ¶ 289 (2003); *see, In the Matter of Personal Communications Industry Ass'n*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶¶ 22, 23 (1998) (declining to find the CMRS marketplace sufficiently competitive where some of six potential competitive PCS licensees may not have begun to offer service).

[5] *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd. 6722, ¶ 123 (2003). The Herfindahl-Hirschman Index, or HHI, a well-accepted measure of market concentration used by the U.S. Department of Justice and the Federal Trade Commission, is described at Section 1.5 of the *Merger Guidelines*. The HHI score is the sum of the squares of the market shares of each platform. The index divides the spectrum of market concentration into three categories: "unconcentrated" for markets with an HHI of less than 1,000; "moderately concentrated" for markets with HHI between 1,000 and 1,800; and "highly concentrated" for markets with an HHI above 1,800. *Merger Guidelines*, § 1.5. We note that the FCC data does not include non-incumbent LEC ADSL on a state-by-state basis. However, if included, it would be unlikely to change the HHI analysis in any significant way since non-incumbent LEC ADSL comprises only 5% of ADSL nationally. In fact, on a national level, with 5% non-incumbent LEC ADSL, 28.7%
(footnote continued on next page)

- Commission statistics show that 14.9% of U.S. zip codes are served by (*i.e.* receive at least a single high-speed line over any technology at any price and any quality level) just one provider and another 17.1% are served by just two providers.[6]

- As of December 31, 2003, ADSL and cable accounted for 91.9% of all high-speed lines in the U.S. and for 97.5% of all high speed lines in the residential and small business market.[7] Of those ADSL lines, incumbent LECs have a 95.0% market share, with competitive LECs accounting for only 5.0%.[8]

- In several SBC states, monopoly or duopoly market power exists in many communities. For example, according to FCC data, in Arkansas, Kansas, Missouri, and Nevada, 40% or more of the zip code areas are served by just one or two providers.[9] It should be kept in mind that this percentage represents only the number of zip codes in a state with at least one high-speed line in service at any price, over any technology, at any level of quality. Accordingly, they likely overstate the level of competition (understate the extent of monopoly and duopoly market power) by including zip codes where one or more providers provides very few if any lines that are comparable in speed, price, or quality to the SBC-ASI DSL service.

Even where the monopoly has been reduced to a duopoly, incumbent LECs like Verizon are a significant player:

(footnote continued from previous page)
incumbent LEC DSL, 58% cable, and 8% "other," the HHI is 4,312, which is still a very highly concentrated market. *FCC June 2004 High-Speed Report*, Table 5 – High-Speed Lines by Type of Provider as of December 31, 2003.

[6] *FCC June 2004 High-Speed Report*, Table 12 – Percentage of Zip Codes with High-Speed Lines in Service.

[7] *FCC June 2004 High-Speed Report*, Table 1 – High Speed Lines and Table 3 – Residential and Small Business High Speed Lines.

[8] *FCC June 2004 High-Speed Report*, Table 5 – High-Speed Lines by Type of Provider as of December 31, 2003.

[9] *FCC June 2004 High-Speed Report*, Table 13 – Percentage of Zip Codes with High-Speed Lines in Service as of December 31, 2003.

- A recent study by the Leichtman Research Group shows that incumbent LEC ADSL exceeded cable in net adds for the First Quarter, 2004.[10]

- 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. According to the Pew Study, fixed-satellite and wireless providers captured just 3% of the market. The Pew Study also confirms the FCC data that 17% of consumers are served by just one last mile broadband provider.[11] Thus, incumbent LECs, including Verizon, are now roughly equal partners in the broadband duopoly/monopoly.

- According to the FCC, ADSL leads cable in several states. For example, SBC's ADSL in California leads cable in market share: ADSL has 49.6% and cable has 41.0% of the market for high-speed lines.[12] In addition, the FCC's data shows that ADSL deployment leads cable modem deployment in the BellSouth state of Georgia by almost 10%.[13]

Moreover, while the Commission's precedent suggests that the relevant geographic market is local,[14] Verizon has provided no adequate data on broadband service competition at the local level. As indicated by the FCC's data cited above, however, the state of broadband competition varies widely from one locality to another. Indeed, in the Commission's still on-

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

[11] Pew Internet Project Data Memo, at 2 and 6 (April 2004), *found at* http://www.pewinternet.org/pdfs/PIP_Broadband04.DataMemo.pdf .

[12] *FCC June 2004 High-Speed Report*, Table 7 – High-Speed Lines By Technology as of December 30, 2003.

[13] *FCC June 2004 High-Speed Report*, Table 7 – High-Speed Lines By Technology as of December 30, 2003.

[14] *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee,* Memorandum Opinion and Order, 16 FCC Rcd. 6547, ¶ 74 (2001) ("[t]he relevant geographic markets for residential high-speed Internet access services are local").

going proceeding addressing the appropriate regulatory classification for wireline broadband services, the State of California and the California Public Utilities Commission entered into the record the following findings:

- "In California, SBC, and other incumbent LECs, continue to be the sole providers of broadband transmission service to nearly half of all residential customers in the state who have access to broadband service."[15]

- "California does not believe that the current state of intermodal broadband competition can be described as effective, price constraining competition. At best, there currently is a duopoly of the incumbent LEC and the cable modem provider. But for many customers, *i.e.*, residential customers who do not have access to cable broadband and the majority of small and medium sized business customers, the incumbent LEC is the sole provider of broadband services. As a result of active regulatory actions in California, competitive LECs were able to provide DSL services in California earlier than elsewhere. However, in the last two years, much of that competition has evaporated as competitors offering DSL services in competition with the incumbent LEC have exited the market. While there were three major wholesale providers of DSL service in competition with Pacific Bell/SBC in 1997, currently only one major non-ILEC provides DSL service in California, and SBC/Pacific owns equity in that company."[16]

- "Forty-five percent of California's population with broadband access (including vast majority of San Francisco, San Jose, Long Beach, Oakland, and Stockton) can only get DSL service and cannot get cable modem service."[17]

- "According to an internal study by the CPUC staff, 35% of Californians live in communities where DSL is the only broadband service choice, while 21% of Californians live in communities that have neither cable modem nor DSL service. Only 30% of the state's population live in communities where both DSL and

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[15] 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, 2002) ("CA Wireline Broadband Reply Comments").

[16] Reply Comments of the State of California and the California Public Utilities Commission, CC Dkt. 01-337 at 12 (filed April 22, 2002) ("CA Dom/Nondom Reply Comments")(footnotes omitted).

[17] *Id.* at 17.

> cable modem services are available. Because of DSL's lower upgrade cost and faster upgrade time frames, incumbent LECs may continue to dominate in providing broadband services in California."[18]

- "Currently, one of three California residents live in areas where DSL service is the sole means of gaining broadband transport to an ISP. The incumbent LECs are the dominant, and in many cases, the exclusive provider of broadband service in California. Certain customers in discrete metropolitan areas may also obtain transport to the Internet from cable operators via a cable modem transmission service over cable facilities; however, in California, primarily because of the substantial cost in upgrading cable facilities to provide cable modem service, such service is limited to certain suburban areas with spotty coverage in downtown urban areas. Other transport methods of accessing the Internet use wireless, broadcast, and unlicensed spectrum technologies. These technologies for transport to the Internet, however, are not widely available to California customers as a viable alternative to either DSL service or cable modem service."[19]

California is not an isolated case. BellSouth's market power is a matter of adjudicated fact by two state public service commissions. Specifically, in November 2003, the Georgia Public Service Commission found that "BellSouth possesses market power in Georgia's high speed internet market, "[20] due in part to the finding that "BellSouth's [market] power in having an overwhelming majority of DSL lines in Georgia is greater than it would be if DSL was not expanding its lead over cable in the relevant market."[21] Similarly, in December 2002, the Louisiana Public Service Commission found that BellSouth was the dominant DSL provider in the state.[22] Thus, given the more localized finds of several states, it can hardly be appropriate for the Commission to find competition in local markets, including those of Verizon, without specific facts that verify the state of competition in those markets.

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[18] *Id.*, at 14-15. *See also*, *id.*, Appendix A (pie chart of DSL, cable and other in California).

[19] Comments of California, CC Dkt. 02-33 at 5-6 (filed May 3, 2002).

[20] *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration*, Georgia Public Service Commission ,Order on Complaint, Docket No. 11901-U, at 6 (Nov. 13, 2003).

[21] *Id.*, at 14.

[22] In *re: BellSouth's Provision of ADSL Service to End-users over CLEC Loops*, Louisiana Public Service Commission, Order R-26173, at 7 (Dec. 18, 2002).

Further, even if one were to move from a local geographic market and conduct an HHI analysis using FCC data on either a national or Verizon state-by-state basis, the broadband market (which includes all broadband lines, regardless of whether they are offered at wholesale to independent ISPs) is currently far more concentrated than a market with an HHI score of 1,800, which is the score the Department of Justice considers indicative of a "highly concentrated" market:

HHI ANALYSIS OF THE STATE-BY-STATE BROADBAND MARKET IN VERIZON TERRITORY USING FCC DATA

State	ADSL (%)	Cable (%)	Other (%)	HHI
Nationwide	33.7	58.3	8.1	4,593.6
Delaware	*	*	4.8	Not known
District of Columbia	50.1	*	*	Not known
Maine	17.9	*	*	Not known
Maryland	26.5	66.7	6.9	5,193.1
Massachusetts	25.0	69.4	5.5	5,477.5
New Hampshire	15.8	79.4	4.8	6,577.5
New Jersey	22.8	70.7	6.6	5,554.1
New York	22.0	70.6	7.4	5,522.3
Pennsylvania	29.3	64.0	6.7	4,998.9
Rhode Island	*	*	3.7	Not known
Virginia	20.2	72.3	7.6	5,684.5
West Virginia	*	77.3	*	Not known

** Data withheld by FCC to maintain firm confidentiality*

As the HHI analysis indicates, even when retail broadband lines are included, the market is extremely concentrated, which strongly indicates the absence of effective competition.

Pursuant to the Commission's *ex parte* 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/

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