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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 Dkt. Nos. 01-338, 96-98, 98-147); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) (WC Dkt. No. 03-235); Qwest Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) (WC Dkt. No. 03-260); BellSouth Telecommunications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) (WC Dkt. No. 04-48)

Dear Ms. Dortch:

This letter addresses the pending forbearance petitions of Verizon and other Bell Operating Companies (“BOCs”) for relief from Section 271 unbundling obligations as they apply to “next generation” network facilities. The FCC may not grant the requested forbearance by relying upon the anecdotal evidence in the record regarding “broadband competition” to satisfy the three pronged forbearance standard under Section 10(a). Rather, the FCC must conduct a genuine market analysis that identifies the relevant product market, including geographic scope and other relevant factors, and then demonstrate, with thorough data regarding such market, that the forbearance would not result in unjust or unreasonable or unreasonably discriminatory rates, would ensure that consumers are protected, and would be consistent with the public interest as the statute requires.

The record includes no such analysis, but rather consists of the same well-worn BOC anecdotes that seek erroneously to reach conclusions about the impact upon wholesale telecommunications service customers of the proposed forbearance by referencing selected data regarding the retail Internet access market.¹ Notably, the FCC has pending before it these same

¹ See, e.g., “Broadband Competition: Recent Developments, March 2004,” filed by Verizon, CC Dkt. Nos. 01-337, 01-338, 02-33; CS Dkt. No. 02-52 (filed March 26, 2004) (providing “facts” on the status of “broadband competition” without first performing the appropriate analysis of determining the product market and the geographic scope of the market).

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issues regarding market definition in its *Dom-Non-Dom* and *Wireline Broadband* proceedings.² Thus, the FCC has already recognized that: “The first step in assessing what regulatory requirements are appropriate for incumbent LEC-provided broadband services is to define and analyze the relevant markets in which incumbent LECs provide these services.”³ Once the product and geographic markets are clearly defined, the FCC must engage in a market power analysis that considers the distinct ways in which market power can be exercised.⁴ Without such an analysis, the FCC cannot satisfy the requirements of Section 10.⁵

² *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd. 22745 (2001) (“*Dom-Non-Dom*”); *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019 (2002) (“*Wireline Broadband Proceeding*”).

³ *Dom-Non-Dom*, ¶¶ 17-32 (footnote omitted). See also, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, 12 FCC Rcd 15756, 15768-69, ¶16 (1997) (“In order to determine that a particular carrier or group of carriers possesses market power, it is first necessary to define the relevant product and geographic markets”); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3285, ¶ 19 (1995) (to determine whether a carrier has market power one must first “identify the relevant product and geographic markets”).

⁴ See *Id.* ¶¶ 28-32 (noting at least two ways market power can be exercised to the detriment of the public interest).

⁵ See e.g., *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) (internal citations omitted) (“[T]he 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.”); *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); *Petition of U S 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) (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.”).

In numerous proceedings involving competition determinations, the FCC has consistently followed, and should now follow, a market analysis based, at a minimum, on the Department of Justice's Horizontal Merger Guidelines.⁶ Rather than loosely refer to "broadband" or "next generation" services or facilities, a distinction must be made between retail and wholesale broadband services and the FCC should hold that the appropriate product market to consider in assessing the competitive impact of the proposed forbearance is the wholesale broadband transport market.⁷

In defining the geographic scope of the market, the FCC has already determined in evaluating the merger of AOL and Time Warner that "[t]he relevant geographic markets for residential high-speed Internet access services are local."⁸ Given this correct focus on the services delivered in a local area, the FCC must therefore rely upon evidence that is sufficiently granular to reflect competitive differences in the local market. Thus, the existence of competitive alternatives – where they exist – in one locality will have no impact on constraining rates, terms and practices in another locality that does not face such competition. Moreover, the FCC must consider evidence of suppliers in the market, including consideration of "potential entrants."⁹ Yet, while the FCC may consider "potential entrants," not every conceivable entrant is a potential entrant. No evidence, for example, shows that cable is a "potential entrant" into the wholesale broadband transport market. Indeed, while wholesale broadband transport customers

⁶ See, n.3, *infra*; United States Dept. of Justice Antitrust Div. and Federal Trade Commission, *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552 (1992) ("*Merger Guidelines*").

⁷ Notably, in a study filed by Verizon, Dennis Carlton indicated the existence of a separate wholesale broadband transport market. *Supplemental Declaration of Dennis W. Carlton and Hal S. Sider* at 5, filed by Verizon, CC Dkt. No. 01-338 (filed March 22, 2004). See also, Letter from Ann Berkoqitz, Verizon to Marlene Dortch, Secretary, FCC, at 5 (filed November 13, 2003) (also acknowledging a separate wholesale broadband transport market).

⁸ *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). The FCC's reasoning was based on the local availability of the underlying broadband transport service: "[A] consumer's choices are limited to those companies that offer high-speed Internet access services in his or her area, and the only way to obtain different choices is to move. While high-speed ISPs other than cable operators may offer service over different local areas (e.g., DSL or wireless), or may offer service over much wider areas, even nationally (e.g., satellite), a consumer's choices are dictated by what is offered in his or her locality." *Id.*

⁹ In order to be considered a potential entrant, the entrant must be able to enter the market "within one year . . . [and] without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase." *Merger Guidelines*, at 9.

have been available to it for several years, cable has doggedly resisted providing wholesale transmission on its broadband facilities and is certainly not likely to change course within the one year period relevant to deeming an entity a “potential entrant.”¹⁰

Further, the FCC must be careful to determine the relevant product market. Here too, the FCC has previously recognized that the retail advanced services market is distinct from the wholesale market.¹¹ The proposed forbearance directly implicates the wholesale availability of broadband transmission and the impact on wholesale customers; the central issue is whether, in the absence of statutory requirements mandating unbundling for wholesale customers (such as CLECs) who utilize wholesale inputs to provide retail services to end-user consumers, there is nonetheless sufficient competition to protect against unjust and unreasonable and not unreasonably discriminatory rates, terms and conditions imposed by the BOCs. Only if demonstrated competition exists for wholesale broadband transmission inputs – which it does not – may the FCC grant the requested forbearance. Thus, whether end-users may enjoy competitive alternatives for retail services is an inquiry that is irrelevant for assessing the impact of the proposed forbearance on wholesale rates, terms and conditions imposed on wholesale customers. Indeed, in a recent letter Verizon emphasized that the “next generation technologies” that are the subject of this forbearance are wholly different than, and offer different services from, the current ADSL offerings in the market today.¹²

Finally, even if it were assumed, *arguendo*, that competitive retail broadband services were somehow relevant, the record is bereft of sufficient evidence upon which the FCC could make findings that there exists local retail broadband services competition, even at the state level. For example, as EarthLink recently explained, FCC statistics show that 14.9% of U.S. zip codes are served by just one provider, another 17.1% are served by just two providers, and in

¹⁰ Letter from Mark J. O'Connor and Kenneth Boley, EarthLink to Marlene Dortch, Secretary, FCC, CC Dkt. Nos. 02-33, 98-10, 95-20, 01-337 (filed April 29, 2003) (“of all the ISPs unaffiliated with a cable provider, EarthLink has been the most successful in obtaining wholesale cable access, but such access is limited to one cable network and two cities on another, covering approximately 20-25 percent of the cable market nationwide.”).

¹¹ As the FCC stated in the *Advanced Services Second R&O*, “we conclude that advanced services sold to Internet Service Providers under the volume and term discount plans [of Incumbent LECs] described above are inherently and substantially different from advanced services made available directly to business and residential end-users. ...” *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 8 (1999).

¹² Letter from Thomas A. Tauke, Verizon, to Michael K. Powell, FCC, CC Dkt. Nos. 01-338, 96-98, 98-147, at 2 (Sept. 2, 2004).

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several states (Arkansas, Kansas, Missouri, and Nevada) 40% of more of the zip code areas are served by just one or two providers.¹³ EarthLink also noted that the HHI for a typical broadband market ranged from 5000 and 5400, which “indicates that the typical broadband internet market is very highly concentrated.”¹⁴

Pursuant to the FCC’s *ex parte* rules, one copy of the memorandum is being filed electronically in each of the above-reference dockets for inclusion in the public record. Please do not hesitate to call if you have any questions.

Respectfully submitted,

/s/

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CC (via email):

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¹³ See, Letter from Donna N. Lampert and Mark J. O’Connor, EarthLink, to Marlene Dortch, Secretary, FCC, CC Dkt. No. 01-338 (Oct. 12, 2004).

¹⁴ *Id.* (citing 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)).