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March 1, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

Re: Request for Investigation of Discriminatory OSS by SBC
Ex Parte Presentation – *Computer III* Further Remand Proceedings
SBC Petition for Declaratory Ruling or Waiver of OSS Same Access
Requirement (CC Dkt Nos. 95-20, 98-10)

Dear Ms. Dortch:

Attached please find a written *ex parte* presentation handed-out to FCC staff and other parties present at a meeting held today, filed this day electronically in the above-captioned dockets.

Please do not hesitate to call me if you have any questions.

Respectfully submitted,

/s/

Mark J. O'Connor
Counsel for EarthLink, Inc.

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Ms. Hillary De Nigro
Enforcement Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Request for Investigation of Discriminatory OSS by SBC
Ex Parte Presentation – *Computer III* Further Remand Proceedings
SBC Petition for Declaratory Ruling or Waiver of OSS Same Access
Requirement (CC Dkt Nos. 95-20, 98-10)

Dear Ms. De Nigro:

EarthLink, Inc. (“EarthLink”), by its attorneys, requests that the Commission, pursuant to its authority under section 403 of the Communications Act (47 U.S.C. § 403), open an investigation into the offering of operations support systems (“OSS”) by SBC Advanced Services, Inc. (“SBC-ASI”) to its affiliated Internet Service Provider (“ISP”). The grounds for the request are set forth herein.

On August 11, 2004, SBC Communications, Inc. (“SBC”) filed a “Petition for Declaratory Ruling or Waiver of OSS Same Access Requirements” (the “SBC Petition”) in the above-referenced dockets. SBC sought this waiver for its advanced services affiliate, SBC-ASI.¹ EarthLink has reason to believe that SBC-ASI has begun provisioning direct access OSS to its own affiliates without receiving the waiver it requested in the SBC Petition. Failing to offer the direct access OSS to both affiliated and unaffiliated ISPs is a violation of SBC-ASI’s *Computer III* obligations and a discriminatory practice in violation of section 202(a) of the Communications Act. Accordingly, EarthLink urges the Enforcement Bureau to immediately investigate this matter.

SBC-ASI is subject to *Computer III* obligations and thus must offer the same OSS to all ISPs as is used by its affiliated ISP. The positions of EarthLink and SBC concerning whether

¹ EarthLink has opposed the SBC Petition for the reasons set forth in previous filings in these dockets. See Opposition of EarthLink, Inc., CC Dkts. 95-20, 98-10 (Oct. 4, 2004).

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Computer III applies to SBC-ASI have been fully briefed by the parties' counsel in EB-04-MD-006, which is publicly available for the FCC staff to review.² The Commission has previously and expressly held that Bell Operating Companies must provide the "same access" to OSS for both affiliated and unaffiliated enhanced service providers.³ To ensure robust competition between ISPs, the Commission's *Computer III* decision imposes "equal access" requirements on interconnection, rejecting "comparability" or "rough comparability" standards because such standards would "reduce carrier incentives to develop truly equal forms of interconnection for enhanced services."⁴

SBC's failure to offer "same access" to OSS is also a discriminatory practice in violation of section 202(a) of the Communications Act. 47 U.S.C. § 202(a). As the FCC has held:

all carriers have a firm obligation under 202(a) of the Act to not discriminate in their provision of transmission service to offer competitive internet access service. Indeed, the Commission has already found that where there is an incentive for a carrier to discriminate unreasonably in its provision of basic transmission services used by competitors to provide enhanced services, section 202 acts as a bar to such discrimination.⁵

OSS is integral to the provisioning of DSL and is critical to a competitive ISP marketplace. The Commission has agreed, stating:

we believe there are serious competitive questions raised by relegating independent ESPs to indirect access status. If, for instance, the BOCs' enhanced services operations has real-time access to OSS information while an independent ESP received only infrequent access to that same information, the playing field would be far from level.⁶

² See FCC File No. EB-04-MD-006, Brief of EarthLink, Inc., pp. 45-49 (Dec. 10, 2004); Supplemented Answer of SBC Communications, Inc. and SBC Advanced Solutions, Inc., pp. 42-43 (June 28, 2004).

³ *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 5 FCC Rcd. 3101, ¶ 43 (1990). See also *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 5 FCC Rcd. 3084, ¶ 3 (1990).

⁴ *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, ¶¶ 147, 149-150 (1986).

⁵ *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd. 7418, ¶ 46 (2001).

⁶ *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 5 FCC Rcd. 3101, ¶ 43 (1990).

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EarthLink looks forward to working with the Commission to resolve this important matter in an expeditious manner. Please feel free to contact the undersigned counsel directly if you have any questions or need for further information.

Respectfully submitted,

/s/

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Jennifer L. Phurrough
Counsel for EarthLink, Inc.