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March 16, 2005

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

Re: *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 sent to FCC staff on March 15, 2005, and 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: *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”) files this letter to clarify where it believes the parties are in agreement and to correct certain misstatements in the SBC letter of March 2, 2005 (“SBC Letter”) filed in the above-referenced proceedings. SBC mischaracterizes EarthLink’s position by claiming it is “EarthLink’s contention that the same access requirement can only be lifted via a waiver or rule change.” SBC Letter at 2. EarthLink has never made such a contention; indeed, only SBC has requested a rule waiver. To the contrary, EarthLink’s position is that the FCC should enforce the clear mandates of the *Computer III* Open Network Architecture (“ONA”) requirements as applied to SBC Advanced Services, Inc. (“SBC-ASI”), not grant rule waivers or rule changes.

Significantly, EarthLink and SBC are in agreement that in 1990 the Commission imposed an ONA requirement on the Bell Operating Companies (“BOCs”) to provide the same operations support systems (“OSS”) to unaffiliated ISPs as is used by the BOC-affiliated ISP. Further, it is undisputed is that the Commission, on reconsideration, held that the same OSS requirement would stand “until the BOCs can demonstrate that indirect access and direct access to the OSS services specified in that order are comparably efficient”¹ The Commission further

¹ *In the Matter of Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order on Reconsideration*, 8 FCC Rcd. 97, ¶ 4 (1993) (“*BOC ONA Further Reconsideration Order*”). The Commission then re-emphasized that the “BOCs may demonstrate comparability . . . at a later date.” *Id.*, ¶ 4.

explained that “[i]n evaluating whether interconnection is comparably efficient we use[] such factors as: absence of systematic differences between basic service access given to the carrier and to others, end-user perception of equality, and absence of a difference in the ability of competitors to provide their enhanced services.”² These decisions have not been overruled or otherwise adjusted by the Commission since that time³ and, indeed, the Commission granted waivers in 1995 in order for the BOCs to avoid *Computer II* structural separation and continue to operate under *Computer III* integration on the condition that the BOCs maintain all *Computer III* CEI and ONA safeguards.⁴

The Commission’s deliberate use of the phrases the “BOCs can demonstrate” and the “BOCs may demonstrate,” yields but one conclusion: the burden of demonstrating comparable efficiency of the available affiliated and unaffiliated OSS’s rests on the BOC seeking to avoid the same OSS requirement. This conclusion also makes sense from a practical perspective, since only the BOC has the information necessary to offer such a showing. Similarly, when the Commission set out a multi-prong test for evaluating comparable efficiency, it expressed undeniably an intention that the Commission would conduct such an inquiry “at a later date” on request of a BOC. The SBC Letter (at 2), however, would have the Commission reverse the established burden, by requiring the BOC only to post a statement on its website that it is offering comparably efficient OSS, and presumably force the ISP to litigate the issue under Section 208 of the Act. Moreover, in addition to the burden issue, SBC’s position is patently defective because it badly confuses the *Computer III* CEI plan requirements and the ONA

² *Id.*, n.12.

³ Subsequently, the Commission reiterated the same OSS ONA requirement when it applied *Computer III* ONA obligations to GTE. *In the Matter of Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, Report and Order*, 9 FCC Rcd. 4922, ¶ 46 (1994) (“In the BOC ONA Reconsideration Order, we required that the following OSS capabilities be treated as basic ONA services: service order entry and status; trouble reporting and status; diagnostics, monitoring, testing and network reconfiguration; and traffic data collection. The BOC ONA Amendment Order also required that BOC enhanced services operations have the same access to OSS services as the BOCs provide to other ESPs.”); *Memorandum Opinion and Order*, 11 FCC Rcd. 1388, ¶ 93 (1995) (“To ensure comparably efficient access, the Commission required a BOC to provide the same access to OSS services to its affiliated enhanced service operations that the BOC provides to unaffiliated ESPs. The Commission expressly extended this requirement to GTE.”).

⁴ *In the Matter of Bell Operating Companies’ Joint Petition for Waiver of Computer II Rules, Memorandum Opinion and Order*, 10 FCC Rcd. 1724, ¶ 12 (1995) (“The BOCs collectively request an interim waiver of Computer II rules so that they can continue to provide existing and new customers with enhanced services pursuant to previously-approved CEI and ONA plans.”).

requirements. The OSS ONA obligations are separate from CEI plan obligations,⁵ and the Commission has not altered the burdens established in the Commission's ONA orders. Thus, SBC's plan to post an OSS commitment as a CEI plan posting would be patently inconsistent with the ONA requirements and far less than what the law requires.

Further, SBC posits that, as a general proposition, gateway access "is comparably efficient to direct access" because "in each and every section 271 authorization order, the Commission held that gateway access met the strict nondiscrimination standard of section 251." SBC Letter at 2. The problem with this argument, of course, is SBC's generality is unsupported. The Commission has never held in the section 271 orders or elsewhere that all gateway or indirect access OSS would be equivalent to all direct access OSS. To the contrary, in each section 271 approval order, the facts of each specific gateway OSS under consideration were separately evaluated by outside auditors, state authorities, and the FCC relative to the specific direct OSS system in question, and specific findings were reached. If the Commission had adopted the general proposition that SBC posits here then surely there would have been no need for the specific factual OSS investigations and OSS findings that fill the Commission's section 271 orders. But, the Commission has never relied on generalities to evaluate the equivalence of gateway and direct access OSS akin to SBC's proposed *non sequitur*.

Similarly, SBC is plainly mistaken when it asserts that the same OSS requirement "has been superceded by subsequent law." SBC Letter at 1. It can cite to no action by the Commission superceding the ONA requirements. Rather, SBC would apparently have the Enforcement Bureau accept the absurd contention that the Commission acted *sub silentio* to retract express rulings when they subsequently fell out of favor with the BOCs. As Chairman Powell recently observed, "Companies cannot engage in misdirection or word games to avoid

⁵ *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Report and Order*, 14 FCC Rcd. 4289, ¶ 14 n. 46 (1998) ("In their CEI plans, BOCs describe how the underlying basic telecommunications services the BOC uses to provide its own information services are to be made available to competing ISPs. In contrast, ONA is intended to give competing ISPs the ability to 'pick and choose' network service elements which are not necessarily used by the BOC in providing its own information service. . . . ONA is the overall design of a carrier's basic network services to permit all users of the basic network, including the information services operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and 'equal access' basis."); *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking*, 16 FCC Rcd. 22745 (2001) ("In the 1999 Computer III Report and Order, the Commission concluded that in today's telecommunications market, given the protection afforded by the ONA requirements and the 1996 Act, it should eliminate the requirement that BOCs file CEI plans and obtain Commission approval for those plans prior to providing new information services").

■ Lampert & O'Connor, P.C.

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their” obligations, “[a]nd they certainly cannot unilaterally decide when and where” they will come into compliance.⁶

At the March 1st meeting, Mr. Epstein of SBC represented to FCC staff that (1) SBC-ASI has begun provisioning direct access OSS to its own affiliated ISP that will not be available to unaffiliated ISPs; (2) the affiliated ISP currently has access to a maintenance function that is not available to unaffiliated ISPs; and (3) in the future, the affiliated ISP will have access to additional OSS functions that will not be available to unaffiliated ISPs. As EarthLink has previously stated, 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 reiterates its request for the

Enforcement Bureau to investigate this matter immediately. Please feel free to contact the undersigned counsel directly if you have any questions or need for further information.

Respectfully submitted,

/s/

Mark J. O’Connor
Jennifer L. Phurrough
Counsel for EarthLink, Inc.

CC (via email and hand-delivery or FedEx):

Ann Stevens
Christi Shewman
Lisa Griffin
A. J. DeLaurentis
Jodie Donovan-May
Gary Phillips
Keith Epstein
Aaron Panner

⁶ Statement of Chairman Michael Powell, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133; *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68 (Feb. 23, 2005).