September 30, 2005

Via ECFS

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

Re: ***In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AT&T Corp., Transferor, to SBC Communications Inc., Transferee, WC Docket No 05-65***

Dear Ms. Dortch:

On September 26, 2005, EarthLink, Inc. submitted for the record a whitepaper in which it repeated arguments it has previously made alleging that the proposed SBC/AT&T transaction (and the proposed Verizon/MCI transaction) will harm competition from independent information service providers ("ISPs"). SBC Communications Inc. and AT&T Corp. ("the Applicants") have previously demonstrated in detail that these allegations have no merit and, in fact, are unrelated to the merger.[1] In order not to repeat our previous submissions and the substantial record before the Commission, we do not respond here going point-by-point through EarthLink's whitepaper.[2] ***We write only to demonstrate that both EarthLink's arguments and the remedy it seeks were rejected by the Commission in the just-released Report & Order in the Wireline Broadband rulemaking***.[3] EarthLink offers no reason for the Commission to reconsider the conclusions it reached in that proceeding, nor would such a

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1 *See, e.g.*, Letter to Marlene Dortch, FCC, from Gary Phillips, SBC, and Lawrence Lafaro, AT&T, Sept. 8, 2005; Letter to Marlene Dortch, FCC, from Gary Phillips, SBC, and Lawrence Lafaro, AT&T, July 26, 2005; Joint Opposition of SBC Communications Inc. and AT&T Corp. to Petitions to Deny and Reply to Comments, May 10, 2005, at 68-72, 74-87, 116-21.

2 Any failure to respond to a particular point, therefore, should not be interpreted as agreement with it.

3 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report & Order and Notice of Proposed Rulemaking, FCC 05-150 (rel. Sept. 24, 2005).

reconsideration be proper here in this merger proceeding rather than in the Wireline Broadband proceeding.

The core of EarthLink's argument is that (1) wireline providers are, and therefore will remain, virtually the only source of broadband transport for ISPs; and (2) absent regulatory intervention, wireline providers will reduce consumer choice by either refusing to sell transport to ISPs or by charging unreasonable prices for that transport.[4] It therefore requests that the merging parties – but not cable companies or any other providers of broadband services – be required to provide broadband transport on a stand-alone basis, at both retail and wholesale, at prices and on other terms that are just, reasonable and non-discriminatory, the hallmarks of common carrier regulation.[5]

EarthLink does not show, nor can it, that its contentions arise from the merger,[6] and in its just released Report & Order, the Commission flatly rejected them. It found arguments such as EarthLink's that focus solely on wireline providers and ignore larger industry trends, such as the existence of larger (cable modem) and emerging (wireless and satellite) providers of broadband services to be unduly myopic:

> "[A] wide variety of competitive and potentially competitive providers and offerings are emerging in this marketplace. Cable modem and DSL providers are currently the market leaders for broadband Internet access service and have established rapidly expanding platforms. There are, however, other existing and developing platforms, such as satellite and wireless, and even broadband over power line in certain locations, indicating that broadband Internet access services in the future will not be limited to cable modem and DSL service…. [T]here is increasing competition

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4 EarthLink Whitepaper at 5 ("the provision of advanced services bandwidth to information service providers ('ISPs') and other service providers on a wholesale basis is confined to the wireline platform"), 29 ("the merger companies will function both as a retail competitor and virtually the only wholesale supplier, and thus can control EarthLink's costs of providing services").

5 *Id.* at 36 ("while EarthLink would not suggest ***detailed*** price regulation, the FCC should make clear that services ***must be offered at just and reasonable rates and terms*** and moreover, that the merged carriers shall impute to their retail service offerings the same charges that are charged for the stand-alone DSL service") (emphasis added).

6 EarthLink does not claim that AT&T is an actual competitor in the provision of wholesale broadband transport, but seeks to establish that AT&T is a potential competitor. *Id.* at 24-25. The only evidence to which it points, however, is 4 ½ years old, and given the elapsed time and changes in the industry, that hardly makes AT&T a perceived or actual potential entrant.

> at the retail level for broadband Internet access service ***as well as growing competition at the wholesale level for network access provided by the wireline providers' intramodal and intermodal competitors.*** We find that an emerging market, like the one for broadband Internet access, is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve."[7]

Indeed, based on a more complete analysis of the marketplace, the Commission concluded that regulatory fiat was not necessary to assure a competitive supply of wholesale or stand-alone retail broadband transport:

> "Based on the record before us, we expect that facilities-based wireline carriers will have business reasons to continue making broadband Internet access transmission services available to ISPs without regard to the *Computer Inquiry* requirements. The record makes clear that such carriers have a business interest in maximizing the traffic on their networks, as this enables them to spread fixed costs over a greater number of revenue-generating customers. For their part, cable operators, which have never been required to make Internet access transmission available to third parties on a wholesale basis, have business incentives similar to those of incumbent LECs to make such transmission available to ISPs, and are continuing to do so pursuant to private carriage arrangements. Given the Supreme Court's decision that cable operators can offer the transmission underlying cable modem service as a functionally integrated part of a finished information service without becoming subject to regulation under Title II, we expect that these wholesale arrangements will continue to evolve.[8]
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> "[C]ompetition from other broadband Internet access service providers, particularly cable modem service providers, will pressure wireline carriers that choose to provide broadband Internet access transmission as a common carrier service to offer their customers rates, terms, and conditions that are just, reasonable, and not unreasonably discriminatory. These carriers, like wireline carriers that offer broadband Internet access transmission on a non-common

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[7] FCC 05-150 at ¶ 50 (emphasis added).

[8] *Id.* at ¶ 64.

> carrier basis, will have business incentives to attract both end user and ISP customers to their networks in order to spread network costs over as much traffic and as many customers as possible."[9]

In fact, the Commission specifically determined that forcing DSL providers to provide retail or wholesale stand-alone transport to ISPs and others not only was unnecessary, but also would be harmful because it would frustrate achievement of Congress's and the Commission's goal of accelerating the deployment of competitive broadband infrastructure:

> "Fostering the ubiquitous availability of broadband Internet access to all Americans across multiple competitive broadband platforms is best accomplished by recalibrating regulation where it is appropriate to do so. Fulfilling our statutory obligations and policy objectives to maximize the acceleration of all types of broadband infrastructure deployment no longer requires a Commission-mandated wholesale *wireline* broadband Internet access transmission market. Requiring a single type of broadband platform provider (*i.e.*, wireline) to make available its transmission on a common carriage basis is neither necessary nor desirable to ensure that the statutory objectives are met. Indeed, … continuing this requirement would contravene these objectives. Importantly, this does not mean that we sacrifice competitive ISP choice for greater deployment of broadband facilities. Rather, … our reasoned judgment tells us that sufficient marketplace incentives are in place to encourage arrangements with innovative ISPs."[10]

Fundamentally, EarthLink seeks to tie its private interests, as an ISP that has failed to develop its own facilities, to the public interest, but, as the Commission just indicated, that link is illusory:

> "We disagree with commenters that equate the ability of ISPs to obtain wireline broadband transmission services on a Title II basis with the ability of consumers to obtain facilities-based competitive broadband Internet access services. A regulatory regime that promotes a competitive broadband Internet access services market where consumers have a choice of multiple providers is not necessarily the same as a regulatory regime that mandates that one particular type of broadband Internet access service transmission

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9 *Id.* at ¶ 91. It is noteworthy that the Commission nowhere mentioned AT&T as a significant potential competitor with respect to these services.

10 *Id.* at ¶ 79.

technology, and one alone, is available, on a nondiscriminatory basis, to any entity that desires to become an ISP."[11]

Sincerely,

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[11] *Id.* at ¶ 61.