

Donna N. Lampert
lampert@l-olaw.com

Tel 202/887-6230
Fax 202/887-6231

Via Hand Delivery

October 19, 2005

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

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Federal Communications Commission
Office of Secretary

Re: *Ex Parte Presentation - Stand-Alone DSL Merger Condition
WC Dkt. 05-65, In the Matter of SBC/AT&T Applications for Approval
of Transfer of Control; WC Dkt. 05-75, In the Matter of Verizon/MCI
Applications for Approval of Transfer of Control*

Dear Ms. Dortch:

This letter addresses a Stand-Alone DSL condition in the context of the FCC's consideration of the above-referenced proceedings. As set forth previously on the record, EarthLink and others have shown the substantial public interest benefits of a requirement that the merged entities offer both retail and wholesale Stand-Alone DSL. Empowering American consumers to take advantage of emerging IP-based offerings and services by freeing them from the requirement to buy legacy wireline local telephone service before they can avail themselves of these services will improve American consumers' post-merger choices, spur innovative communications and increase redundancy, to the benefit of our economy and homeland security.

EarthLink urges the FCC to condition the approval of the proposed mergers upon a requirement that there be reasonable contract-based arrangements for wholesale Stand-Alone DSL, including baseball-style (last-offer) arbitration that creates incentives for reasoned and fair commercial negotiations. The competitive IP-based services that such wholesale arrangements would enable will free consumers and businesses to choose innovative services that significantly outpace POTS and help ameliorate the negative impacts of the proposed mergers. Consumer adoption and broadband deployment can best be driven by companies such as EarthLink that have longstanding consumer relationships and the scale and scope to craft new offerings to leverage wholesale Stand-Alone DSL.

EarthLink also submits that a direct-to-the-consumer, retail Stand-Alone DSL offering is needed to increase further consumer service options. Of course, if consumers are charged

unreasonably high prices for the retail Stand-Alone service, the benefits of the offerings will be undermined. Rather than embark upon traditional rate regulation, however, the FCC should adopt a general “reasonableness” requirement combined with reliance on wholesale alternatives in the first instance (noting its reasoned expectation that wholesale competition will help constrain unreasonable retail prices). Reasonable pricing in this context can, of course, vary with costs, markets, and the differential between Stand-Alone and tied DSL. Should complaints about pricing arise, the FCC could evaluate such matters on a case-by-case basis, seeking to ensure no unlawful cross-subsidization of regulated/non-regulated services and/or violation of Section 254(k) of the Act.

The benefits of this market-based approach far outweigh any minimal costs imposed as it relies upon the market-disciplining effect of alternative wholesale Stand-Alone offerings while still requiring that prices be “reasonable.” This approach does not involve the FCC in the legacy pricing regime, which can be a very complex and lengthy process. By requiring contract-based wholesale Stand-Alone DSL at reasonable rates, subject to negotiation, the FCC would provide market-based opportunities for consumer choice from alternative suppliers. In so doing, the presence of competitive alternatives further harnesses market forces to discipline SBC and Verizon if they chose to charge consumers unreasonable retail prices. This is consistent with recent FCC decisions and a “lightest touch” regulatory framework. Indeed, in its decision in the *Wireline Broadband R&O*, both SBC and Verizon are on the record stating “they have business incentives” to enter into wholesale contractual arrangements.¹

Today, while not compelled to do so by the Commission, Verizon offers a version of Stand-Alone DSL at both retail and wholesale, with the wholesale rate no higher than the DSL offerings that are not Stand-Alone. SBC has asserted to the Commission that it also plans a Stand-Alone service.² Thus, rather than represent “outdated regulations” that may distort broadband market forces, a Stand-Alone DSL condition premised upon wholesale contractual arrangements and market-constrained retail pricing would be wholly consistent with the Commission’s vision of the broadband marketplace.³ Critically, neither would a Stand-Alone DSL condition impose a regulatory disparity by forcing SBC and Verizon to do something the

¹ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, FCC No. 05-150 ¶ 74 (rel. Sept. 23, 2005) (“*Wireline Broadband Order*”).

² Comments of SBC Communications, Inc., WC Dkt. No. 03-251, at 19 (filed June 13, 2005) (SBC “is contemplating trials of xDSL-based Internet access to customers that do not purchase Wireline voice service from SBC”). SBC further claimed that “most of the major ILECs have indicated that they are now making the investments necessary to offer a ‘naked’ xDSL-based broadband offering.” *Id.*, at 18.

³ *Wireline Broadband Order*, ¶¶ 17, 44.

☐ Lampert & O'Connor, P.C.

EarthLink Notice of Ex Parte Presentation – WC Dkt Nos. 05-65, 05-75

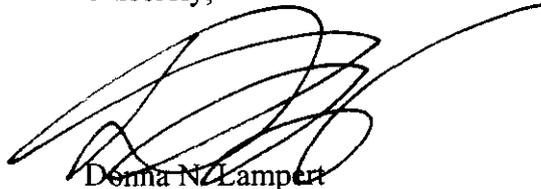
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cable operators do not; as SBC recently explained to the Commission, “all of the major cable operators already offer standalone broadband”⁴

In sum, if the Commission is to bring the vast promise of IP-Enabled services to the American public, it should adopt a Stand-Alone DSL condition if it approves the SBC/AT&T and Verizon/MCI merger applications. Consistent with the Commission’s ex parte rules, two copies of this letter will be filed in each of the above-referenced dockets.

Sincerely,

A handwritten signature in black ink, appearing to read "Donna N. Lampert", with a long, sweeping flourish extending to the right.

Donna N. Lampert
Counsel for EarthLink, Inc.

⁴ Comments of SBC Communications, Inc., WC Dkt. No. 03-251, at 15 (filed June 13, 2005).