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September 20, 2006

***Via Electronic Submission***

Ms. Marlene Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65;  
*AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74  
Notice of Ex Parte Filing

Dear Ms. Dortch:

On behalf of AT&T Inc. (AT&T), I am writing in response to the *ex parte* filed by EarthLink, Inc. (EarthLink) on September 12, 2006, in the above-referenced dockets. In the *ex parte*, EarthLink alleges that the manner in which AT&T provides stand-alone ADSL service violates the stand-alone ADSL and net neutrality commitments AT&T made in connection with the merger between SBC Communications, Inc. and AT&T Corp.<sup>1</sup> Specifically, based on a series of erroneous factual and legal assumptions, EarthLink alleges that: (i) AT&T's pricing for stand-alone ADSL service is "anticompetitive," and (ii) AT&T has violated its commitments by not offering to sell stand-alone ADSL service to EarthLink. To address these purported violations, EarthLink asks the Commission to effectively repeal its *Wireline Broadband Order*<sup>2</sup> by requiring AT&T to provide stand-alone ADSL service as a "telecommunications service" subject to Title II common carrier regulation.

As explained below, AT&T is in full compliance with its stand-alone ADSL and net neutrality commitments and EarthLink's allegations to the contrary are based on deliberate and fundamental distortions of the plain language of those commitments. Moreover, while neither commitment contains any restriction on the price AT&T charges for stand-alone ADSL service, AT&T's pricing for that service is competitive with the pricing of broadband Internet access

<sup>1</sup> Letter from Donna Lampert, Counsel for EarthLink, to Marlene Dortch, FCC, WC Docket Nos. 05-65 and 06-74 (Sept. 12, 2006) (EarthLink *ex parte*).

<sup>2</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order, FCC 05-150 ¶ 14 (released Sept. 23, 2005) (*Wireline Broadband Order*).

services offered by other providers and is consistent with the Commission's expectation that such services would "reflect the underlying competitiveness of the market."<sup>3</sup>

While EarthLink's allegations are thus factually and legally incorrect, they also are contradicted by its own marketplace initiatives, announced with great fanfare on the very same day it filed its *ex parte* in this proceeding. Indeed, at the same time EarthLink argues to this Commission that AT&T is inhibiting the development of the VoIP market, it proudly proclaims to potential customers and investors that consumers can "fire Ma Bell" and receive all the benefits of VoIP directly from EarthLink.<sup>4</sup> Accordingly, for all of these reasons, the Commission should reject EarthLink's baseless and self-serving claims.

### **I. Stand-Alone ADSL Service Commitment.**

In connection with the SBC-AT&T merger, the merged entity committed, among other things, that within twelve months of the merger closing date, it "will deploy and offer within its in-region territory ADSL service to ADSL-capable customers without requiring such customers to also purchase circuit switched voice grade telephone service."<sup>5</sup> It further committed to offer stand-alone ADSL service in each state for two years after the "implementation date" in that state.<sup>6</sup> For purposes of this commitment, the "implementation date" for a state is the date on which the merged entity can offer stand-alone ADSL service to 80 percent of "the ADSL-capable premises" in its territory in that state.<sup>7</sup>

Although AT&T is not required to offer stand-alone ADSL service until November 18, 2006 (twelve months after the merger closing date), AT&T has already begun offering this service to consumers in its territory. In June 2006, AT&T announced that "AT&T Yahoo! High Speed Internet service is now available to customers who do not subscribe to AT&T voice services."<sup>8</sup> Even EarthLink admits that AT&T is offering stand-alone ADSL service to its customers.<sup>9</sup> Thus, there can be no serious dispute that AT&T is, in fact, complying with the plain language of the stand-alone ADSL commitment. As explained below, EarthLink's claims to the

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<sup>3</sup> *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, FCC 05-183, ¶ 207 (released Nov. 17, 2005) (*SBC-AT&T Merger Order*).

<sup>4</sup> More Consumers Can Fire Ma Bell Thanks to EarthLink's Expanded Internet Voice Technology, EarthLink Press Release (Sept. 12, 2006).

<sup>5</sup> Letter from James C. Smith, SBC, to Kevin Martin, FCC, WC Docket No 05-65, at 4 (Oct. 31, 2005) (AT&T Commitment Letter).

<sup>6</sup> AT&T Commitment Letter at 4.

<sup>7</sup> AT&T Commitment Letter at 4.

<sup>8</sup> See *AT&T Delivers Greater Consumer Choice with New Wireless, VoIP and High Speed Internet Offers*, AT&T News Release (June 30, 2006).

<sup>9</sup> EarthLink *ex parte* at 1, 3.

contrary are based on a misrepresentation of the terms of AT&T's stand-alone ADSL commitment and, thus, are entirely baseless.<sup>10</sup>

*Pricing.* According to EarthLink, AT&T charges “significantly more” for stand-alone ADSL service than it charges for ADSL service bundled with voice service, thereby making it impractical for consumers to purchase voice service from a competing VoIP provider.<sup>11</sup> In EarthLink's view, AT&T's pricing is “anticompetitive” and violates the stand-alone ADSL commitment because it will “discourage VoIP offerings” from other providers and inhibit the development of competitive VoIP services.<sup>12</sup>

For the reasons discussed below, not only are EarthLink's factual allegations wrong – both as to the viability of VoIP competition and AT&T's stand-alone DSL pricing – but so too is its legal theory. According to that theory, AT&T's stand-alone ADSL *prices* violate the merger commitment.<sup>13</sup> The stand-alone ADSL commitment, however, in no way purports to regulate the price of stand-alone ADSL service. To the contrary, when the Commission adopted that commitment as a merger condition, it expressly contemplated that stand-alone ADSL service would be offered at market rates determined solely by AT&T.<sup>14</sup> EarthLink's attempt to fabricate a pricing condition where none exists is unavailing.

Aside from lacking any legal basis for its claims that AT&T has violated the stand-alone ADSL merger commitment, there is also no factual basis for EarthLink's allegations. In particular, EarthLink's claim that AT&T's stand-alone ADSL pricing is inhibiting the development of VoIP competition is belied by the explosive growth of VoIP as an alternative to traditional voice offerings. Consumers can scarcely turn on their televisions, pick up a newspaper or browse the Internet without coming across an advertisement for a VoIP service offered by one of the myriad competitive VoIP providers. Indeed, Yankee Group reports that the market for consumer VoIP services grew by more than 250 percent in 2005.<sup>15</sup> IDC predicts that U.S. residential VoIP subscribers will grow from 4.25 million in 2005 to more than 44 million by 2010, at which point more than 60 percent of broadband households will subscribe to VoIP service.<sup>16</sup> As market research firm New Paradigm Resources Group observed:

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<sup>10</sup> See EarthLink *ex parte* at 3 (admitting that its arguments are based in part on the “spirit” of the commitment).

<sup>11</sup> EarthLink *ex parte* at 3.

<sup>12</sup> EarthLink *ex parte* at 1, 3, 6.

<sup>13</sup> EarthLink *ex parte* at 2.

<sup>14</sup> *SBC-AT&T Merger Order* ¶ 207 (“We expect that the terms and conditions for these services will reflect the underlying competitiveness of the market.”).

<sup>15</sup> The VoIP Evolution Continues: Forecasting Broadband VoIP and Cable Telephony, Yankee Group, at 1 (August 2006).

<sup>16</sup> U.S. Residential VoIP Services 2006-2010 Forecast and Analysis: Where There is Smoke, Is There Fire?, IDC, at 5-6, Table 1 (May 2006). See also Cable Racks Up over 1 Million VoIP Subs in Q2, Cable Digital News (Sept. 8,

Voice over Internet Protocol (VoIP) is booming. Why wouldn't it be? The cost structure is low enough to enable IP-voice to generate the same profit margin as TDM-voice does, even as it is offered at significantly lower prices. End-users, who may otherwise be reluctant to adopt VoIP innovation, are lured away from traditional telephone services by the lower pricing and higher number of standard features that are available with VoIP service.<sup>17</sup>

To the extent there is any doubt about the robustly competitive nature of the VoIP market, however, EarthLink's own marketplace behavior further belies the anticompetitive pricing claims in its *ex parte*. Through its acquisition of New Edge Networks and its partnership with Covad, EarthLink has access to not one, but two, nationwide, facilities-based broadband networks over which it can offer VoIP services to residential and business consumers. For example, New Edge boasts the "nation's largest broadband coverage area,"<sup>18</sup> which allows ISPs to "deliver broadband services to over 11,000 central offices (CO) nationwide."<sup>19</sup> Similarly, Covad has announced that when it completes the build-out of its next-generation broadband network in the fourth quarter of this year, it "will operate the nation's largest ADSL 2+ network, enabling high-speed data and next-generation voice services to millions of businesses and residences."<sup>20</sup> Indeed, earlier this year EarthLink and Covad jointly announced they were expanding the availability of an "innovative bundle" of VoIP and DSL services that "far exceeds the competition in both voice quality and features."<sup>21</sup>

But the most telling admission about the competitiveness of the VoIP market came directly from EarthLink – ironically, on the very same day it filed its *ex parte* with this Commission bemoaning purported impediments to VoIP growth. Specifically, on September 12, 2006, EarthLink issued a press release confidently proclaiming that "more consumers can fire Ma Bell thanks to EarthLink's expanded Internet voice technology."<sup>22</sup> According to EarthLink, consumers of its VoIP service will "receive all the cost savings and special telephone features of an Internet-based voice service without installing any special equipment or hardware – in addition

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2006) ("North American cable operators are now signing up an average of about 11,000 new customers a day for IP phone service . . .").

<sup>17</sup> VoIP Report 3<sup>rd</sup> Edition, New Paradigm Resources Group, Inc., at Chapter 2 (April 2006).

<sup>18</sup> See New Edge Networks website at [http://www.newedgenetworks.com/products/atm\\_over\\_dsl/](http://www.newedgenetworks.com/products/atm_over_dsl/).

<sup>19</sup> See New Edge Networks website at [http://www.newedgenetworks.com/products/wholesale\\_dsl/](http://www.newedgenetworks.com/products/wholesale_dsl/).

<sup>20</sup> Covad Continues Build-Out of Next-Generation Network in Eight Markets, Covad Press Release (July 20, 2006).

<sup>21</sup> EarthLink and Covad Announce Additional Markets for Innovative Bundle of Voice Services and High-Speed Internet, EarthLink Press Release (March 16, 2006).

<sup>22</sup> More Consumers Can Fire Ma Bell Thanks to EarthLink's Expanded Internet Voice Technology, EarthLink Press Release (Sept. 12, 2006).

to the super-fast speed of next-generation broadband technology.”<sup>23</sup> And while EarthLink’s *ex parte* focuses on California as the state where AT&T’s stand-alone ADSL pricing allegedly poses an impediment to VoIP competition, EarthLink’s press release shows that it has deployed its VoIP service to more cities in California than in any other state.<sup>24</sup> Thus, EarthLink cannot be taken seriously when it tells this Commission that more regulation of AT&T’s stand-alone ADSL service is necessary to ensure VoIP competition.

EarthLink’s assertion that AT&T’s stand-alone ADSL prices are unreasonable and anticompetitive fares no better. The price AT&T charges for stand-alone ADSL service (\$44.99 per month) is competitive with the prices charged by other broadband providers for their own stand-alone broadband Internet access services.<sup>25</sup> For example, market-leading cable companies offer stand-alone broadband Internet access services with prices at or above the price AT&T charges for its stand-alone ADSL service: Time Warner (\$49.95 per month), Cox (\$51.95 per month), Cablevision (\$49.95 per month), and Comcast (\$57.95 per month).<sup>26</sup> Similarly, Qwest offers stand-alone ADSL service at the regular monthly rate of \$44.99.<sup>27</sup>

EarthLink completely ignores all of these competitive, stand-alone broadband offerings and instead alleges that “Verizon offers its stand-alone service for \$19.95/month.”<sup>28</sup> EarthLink, however, conveniently neglects to mention some significant details about Verizon’s offer. It is AT&T’s understanding that Verizon’s \$19.95 per month rate is a promotional rate for 768 Kbps service (rather than 1.5 Mbps service) and is available only for the first three months of service. After the first three months, Verizon’s rate increases to \$29.95 per month, but only if the customer is willing to commit to a 12-month contract. If not, Verizon’s month-to-month rate for stand-alone DSL service is \$37.95 per month. Thus, regardless of EarthLink’s deceptive attempt

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<sup>23</sup> More Consumers Can Fire Ma Bell Thanks to EarthLink’s Expanded Internet Voice Technology, EarthLink Press Release (Sept. 12, 2006).

<sup>24</sup> See EarthLink *ex parte* at 3 (comparing rates for ADSL and telephone service in California); More Consumers Can Fire Ma Bell Thanks to EarthLink’s Expanded Internet Voice Technology, EarthLink Press Release (Sept. 12, 2006) (touting deployments in the Los Angeles, San Diego, San Francisco and San Jose metropolitan areas).

<sup>25</sup> AT&T currently offers stand-alone ADSL service up to 1.5 Mbps for \$44.99 per month with a six-month term commitment. At the expiration of the six-month term, the price remains \$44.99 per month.

<sup>26</sup> See Time Warner Cable website at <http://mktg.twcsd.com/pricing/sandiego/>; Cox Communications website at <http://www.cox.com/oc/highspeedinternet/pricing.asp> (pricing effective October 1, 2006); Cablevision website at <http://www.optimumonline.com/index.jhtml?pageType=pricing>; Comcast website at <http://www.comcast.com/Localization/Localize.ashx?Referer=/shop/buyflow/default.ashx>. To the best of AT&T’s knowledge, all of the pricing information contained herein is accurate as of the date of this letter. In the dynamic and competitive broadband marketplace, however, AT&T expects that the prices cited in this letter (including AT&T’s own rates) will vary over time as providers respond to changing market conditions.

<sup>27</sup> See Qwest website at <http://www.qwest.com/residential/internet/pricing.html>. Qwest is currently running a “limited time” promotion for new customers only, expiring October 14, 2006, that provides a \$13.00 per month discount for the first 12 months of their stand-alone ADSL service.

<sup>28</sup> EarthLink *ex parte* at 7.

to portray Verizon as offering “\$19.95” stand-alone ADSL service, AT&T’s stand-alone ADSL service is priced in a manner that “reflect[s] the underlying competitiveness of the market.”<sup>29</sup>

Having failed to demonstrate that the pricing of AT&T’s stand-alone ADSL service is out of line with the pricing of broadband services by other providers, EarthLink next focuses on the price AT&T charges for “bundles” of ADSL service plus circuit-switched voice service. According to EarthLink, a hypothetical customer in California could purchase AT&T’s 1.5 Mbps ADSL service for \$12.99 per month together with (i) AT&T’s Measured Rate local service for \$5.70 per month; (ii) AT&T’s Flat Rate local service for \$10.69 per month; or (iii) AT&T’s Flat Rate Local Service plus 300 minutes of long distance service for \$26.69 per month.<sup>30</sup> As a result, the hypothetical customer posited by EarthLink could obtain an ADSL / POTS bundle at the respective monthly rate of \$18.69 (with Measured Rate local), \$23.68 (with Flat Rate local), or \$39.68 (with Flat Rate local plus 300 long distance minutes), each of which is less than the \$44.99 monthly rate that AT&T charges for stand-alone ADSL service.<sup>31</sup> In EarthLink’s view, the pricing for these bundles is anticompetitive because it would “discourage” the hypothetical customer from purchasing AT&T’s stand-alone ADSL service plus a VoIP service offered by EarthLink or another VoIP provider.<sup>32</sup>

EarthLink’s arguments based on this hypothetical California customer are deeply flawed and grossly misstate the cost of the services at issue. In calculating the rates allegedly paid for circuit-switched voice service by its hypothetical customer, EarthLink omits the subscriber line charge (SLC), the charge to recover contributions to the federal universal service fund, the charges to recover contributions to five separate California universal service funds, as well as other state and local fees and taxes (e.g., California PUC user fees, 911 cost recovery fees, city and county utility taxes).<sup>33</sup> EarthLink also assumes that its hypothetical customer has no interest in purchasing any of the popular “vertical services” found in many households today, such as voicemail, call forwarding, call waiting, call blocking, and caller ID, which EarthLink and many other VoIP providers include as “free” standard features in their own VoIP offerings.<sup>34</sup> Most egregiously, by failing to include any usage charges for Flat Rate or Measured Rate local service,

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<sup>29</sup> *SBC-AT&T Merger Order* ¶ 207.

<sup>30</sup> EarthLink *ex parte* at 3.

<sup>31</sup> EarthLink *ex parte* at 3.

<sup>32</sup> EarthLink *ex parte* at 3, 6.

<sup>33</sup> See, e.g., California PUC website at <http://www.cpuc.ca.gov/static/telco/consumer+information/surcharges.htm>. (“There are a number of surcharges and taxes assessed on telecommunications services by the State of California, city and county governments, and federal agencies.”)

<sup>34</sup> See EarthLink “trueVoice” service plans at <http://www.earthlink.net/voice/truevoice/plans/> (listing voicemail, call forwarding, call waiting, call blocking and caller ID as “free” features of EarthLink’s VoIP service). See also Vonage Residential Basic 500 Minutes Plan at [http://www.vonage.com/services\\_basic.php](http://www.vonage.com/services_basic.php); Vonage Residential Premium Unlimited Plan at [http://www.vonage.com/services\\_premium.php](http://www.vonage.com/services_premium.php); Voice Pulse Broadband Phone Service Features at <http://www.voicepulse.com/features/default.aspx>.

EarthLink assumes that its hypothetical purchaser of Flat Rate local service does not make *any* interstate or intrastate toll calls, and its hypothetical purchaser of Measured Rate local service does not make *any* telephone calls at all. Aside from being entirely unrealistic, EarthLink's zero usage assumptions are highly disingenuous considering that EarthLink provides subscribers of its own "basic" VoIP offering with 500 minutes of local and long distance calling each month.<sup>35</sup>

When charges for 500 minutes of service and comparable features are included in the AT&T rate plans cited by EarthLink, the monthly costs for a customer in California are approximately \$49.16 for Measured Rate service,<sup>36</sup> \$48.15 for Flat Rate Local Service,<sup>37</sup> and \$56.15 Flat Rate Local Service plus 300 minutes of long distance service<sup>38</sup> (without including any regulatory fees or taxes). If the customer then purchases AT&T's 1.5 Mbps ADSL service at the promotional rate of \$12.99 per month, his or her total monthly charge for AT&T ADSL service plus circuit-switched voice service would be approximately \$62.15 (Measured Rate local service), \$61.14 (Flat Rate local service), and \$69.14 (Flat Rate local service plus 300 minutes of long distance).<sup>39</sup> At the end of the 12-month promotional period, when the price of ADSL service increases to \$29.99 per month, the customer's total monthly charge for AT&T ADSL service plus circuit-switched voice service would be \$79.15, \$78.14, and \$86.14, respectively.

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<sup>35</sup> See EarthLink "trueVoice basic" service plan at <http://www.earthlink.net/voice/truevoice/plans/>. See also Vonage Residential Basic 500 Minutes Plan at [http://www.vonage.com/services\\_basic.php](http://www.vonage.com/services_basic.php).

<sup>36</sup> The \$49.16 monthly cost for the Measured Rate local service customer is calculated as follows: Measured Rate local service (\$5.70) + SLC (\$4.65) + voice mail (\$8.95) + call forwarding (\$3.23) + call waiting (\$3.23) + call blocking (\$3.23) + caller ID (\$6.17) + 400 minutes of local calling (\$6.00) + 100 minutes of long distance calling (\$8.00). AT&T included these features because EarthLink includes similar features in its own "basic" VoIP offering. See *supra* note 34. In calculating the usage costs for this customer, AT&T conservatively estimated that the majority (80 percent) of the customer's calls would be local and would cost a total of \$6.00 (400 minutes at 1.5 cents per minute). For the remaining long distance calls (20 percent or 100 minutes), AT&T conservatively estimated that the customer would select AT&T's Nationwide Calling 100 plan for \$8.00 per month, which contains no separate minimum usage charges.

<sup>37</sup> The \$48.15 monthly cost for the Flat Rate local service is calculated as follows: Flat Rate local service (\$10.69) + SLC (\$4.65) + voice mail (\$8.95) + call forwarding (\$3.23) + call waiting (\$3.23) + call blocking (\$3.23) + caller ID (\$6.17) + 400 minutes of local calling (included) + 100 minutes of long distance calling (\$8.00). In calculating the usage costs for this customer, AT&T conservatively estimated that the majority of the customer's calls would be local (80 percent or 400 minutes). For the remaining long distance calls (20 percent or 100 minutes), AT&T conservatively estimated that the customer would select AT&T's Nationwide Calling 100 plan for \$8.00 per month, which contains no separate minimum usage charges.

<sup>38</sup> The \$56.15 monthly cost for the Flat Rate local service plus 300 minutes of long distance service is calculated as follows: Flat Rate local service (\$10.69) + SLC (\$4.65) + voice mail (\$8.95) + call forwarding (\$3.23) + call waiting (\$3.23) + call blocking (\$3.23) + caller ID (\$6.17) + 200 minutes of local calling (included) + 300 minutes of long distance calling (\$16.00).

<sup>39</sup> The current \$12.99 promotional rate, which EarthLink complains about in its *ex parte*, is scheduled to expire on September 30, 2006. See AT&T website at [http://www.sbc.com/gen/general?pid=6431&R=cf&cf\\_search=at%26t%20dsl&cf\\_create=598962685&cf\\_adx=1818390048517](http://www.sbc.com/gen/general?pid=6431&R=cf&cf_search=at%26t%20dsl&cf_create=598962685&cf_adx=1818390048517) ("Hurry! Offer ends 9/30/06.").

By contrast, if the same customer decided to purchase AT&T's stand-alone ADSL service at \$44.99 per month, plus EarthLink's "trueVoice basic" VoIP services at \$14.95 per month, which includes 500 minutes of local and long distance plus voicemail, call forwarding, call waiting, call blocking, and caller ID, the customer would be charged a total of only \$59.94 (excluding any applicable taxes or fees).<sup>40</sup> Moreover, EarthLink offers its *own* bundle of 1.5 Mbps DSL-based broadband Internet access service plus "basic" VoIP service for just \$49.95.<sup>41</sup> Given EarthLink's ability to undercut AT&T's prices as both a provider of VoIP service and as a provider of bundled packages of VoIP and broadband Internet access services, its claim of "anticompetitive" pricing by AT&T is specious.

*Offers to Customers.* EarthLink next alleges that, as part of its stand-alone ADSL commitment, AT&T "committed to offer stand-alone ADSL service to *all customers*."<sup>42</sup> According to EarthLink, AT&T has violated that commitment by "fail[ing] to offer stand-alone ADSL as promised" to EarthLink.<sup>43</sup> But just as with its flawed pricing allegations, EarthLink has ignored the actual text of AT&T's stand-alone ADSL commitment. AT&T did not commit to provide stand-alone ADSL service to EarthLink or any other ISP. Instead, AT&T committed that it would offer stand-alone "ADSL service to *ADSL-capable customers*."<sup>44</sup> AT&T further committed that it would continue to offer stand-alone ADSL service in each state for two years after it had deployed the service to 80 percent of the "*ADSL-capable premises*" within its territory in that state.<sup>45</sup> EarthLink, however, is *not* an "ADSL-capable customer" itself and it is not requesting stand-alone ADSL service at its own "ADSL-capable premises." Rather, EarthLink is an ISP seeking to *serve* ADSL-capable customers at the customers' own ADSL-capable premises in AT&T's region. Thus, contrary to EarthLink's misguided claims, nothing in AT&T's stand-alone ADSL commitment requires AT&T to provide stand-alone ADSL service to EarthLink.

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<sup>40</sup> See EarthLink "trueVoice basic" service plan at <http://www.earthlink.net/voice/truevoice/plans/>.

<sup>41</sup> See EarthLink "basic" VoIP service plus DSL bundle plan at <http://www.earthlink.net/voice/bundles/dslhomephone/>.

<sup>42</sup> EarthLink *ex parte* at 1 (emphasis added).

<sup>43</sup> EarthLink *ex parte* at 9.

<sup>44</sup> AT&T Commitment Letter at 4 (emphasis added). See also *SBC-AT&T Merger Order* ¶ 207 ("In order to ensure that this commitment benefits *consumers*, we will monitor all *consumer-related* problems concerning this service, including reviewing *consumer* complaints and other information.") (emphasis added); *Statement of Commissioner Michael J. Copps, Concurring, SBC-AT&T Merger Order* (the stand-alone ADSL commitment "means *consumers* can buy DSL without being forced to also purchase voice service.") (emphasis added); *Statement of Jonathan S. Adelstein, Concurring, SBC-AT&T Merger Order* (the stand-alone ADSL commitment "will substantially expand the options available to residential and business *consumers*.") (emphasis added).

<sup>45</sup> AT&T Commitment Letter at 4 (emphasis added). See also *SBC-AT&T Merger Order*, Appendix F.

## II. Net Neutrality Commitment.

EarthLink also twists the law and the facts with respect to AT&T's net neutrality commitment. In the net neutrality commitment, AT&T stated that, for a period of two years following the merger closing date, it would conduct its business in a manner that comports with the Commission's net neutrality principles.<sup>46</sup> EarthLink now asserts that the way in which AT&T prices and offers its stand-alone ADSL service "undermines" two of those principles: the ability of consumers to "run applications and use services of their choice," and the ability of consumers to enjoy "competition among network providers, application and service providers, and content providers."<sup>47</sup>

Contrary to EarthLink's suggestions, however, neither the plain language of AT&T's net-neutrality commitment nor the Commission's net neutrality principles themselves contain any limitations, restrictions or other conditions related to the price of AT&T's stand-alone ADSL service. Even without such conditions, however, the pricing of AT&T's stand-alone ADSL service does not prevent consumers from using VoIP services over their ADSL connections. As discussed at length above, AT&T's pricing enables VoIP providers, including EarthLink, to offer attractively priced VoIP services and VoIP/DSL bundles that provide competitive alternatives to the circuit-switched voice and ADSL services offered by AT&T. Thus, EarthLink's net neutrality claim fails for all of the same reasons as its meritless stand-alone ADSL claim.

## III. Common Carrier Regulation.

To remedy AT&T's purported violations of the stand-alone ADSL and net neutrality commitments, EarthLink asserts that the Commission should require AT&T to "offer stand-alone ADSL on a non-discriminatory basis as a telecommunications service on just and reasonable terms and conditions without any resale or use restrictions."<sup>48</sup> In order to effectuate this remedy, EarthLink argues that AT&T "should be subject to a specific ADSL stand-alone condition with additional FCC oversight."<sup>49</sup> As discussed above, AT&T is in full compliance with its stand-alone ADSL and net neutrality commitments and EarthLink's demand for the imposition of further conditions on AT&T in either the SBC-AT&T or AT&T-BellSouth merger proceedings is entirely baseless.

More fundamentally, however, EarthLink's demand for the imposition of common carrier regulation on AT&T fails for the simple reason that the Commission has conclusively determined as a matter of law that wireline broadband Internet access services, such as AT&T's stand-alone

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<sup>46</sup> AT&T Commitment Letter at 4. *See also SBC-AT&T Merger Order* at Appendix F.

<sup>47</sup> EarthLink *ex parte* at 9. *See also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151, ¶ 4 (released Sept. 23, 2005).

<sup>48</sup> EarthLink *ex parte* at 10.

<sup>49</sup> EarthLink *ex parte* at 10.

ADSL service, are not “telecommunications services” subject to Title II of the Communications Act. Specifically, in the *Wireline Broadband Order*, which was adopted nearly three months before the *SBC-AT&T Merger Order*, the Commission found that wireline broadband Internet access service is an information service subject to Title I of the Act.<sup>50</sup> Thus, to impose the remedy that EarthLink seeks here, the Commission must first repudiate the core holdings of the *Wireline Broadband Order* and reverse the pro-consumer, deregulatory course it has charted for broadband Internet access services over the last decade.<sup>51</sup> Indeed, at bottom, EarthLink’s *ex parte* is a thinly veiled demand for a return to monopoly-era, common carrier regulation of wireline broadband Internet access. The Commission and the courts have had the wisdom to rebuff similar demands by EarthLink in the past.<sup>52</sup> The Commission should do so again here by flatly rejecting EarthLink’s arguments and expeditiously approving the AT&T-BellSouth merger.

If you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

/s/

Gary L. Phillips

CC: Michelle Carey  
Scott Deutchman  
Scott Bergmann  
Ian Dillner  
John Hunter  
Tom Navin  
Don Stockdale  
Bill Dever  
Nick Alexander

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<sup>50</sup> *Wireline Broadband Order* ¶ 14.

<sup>51</sup> See Broadbandits, Thomas Hazlett, Wall Street Journal (Aug. 12, 2006) (according to former FCC Chief Economist Thomas Hazlett, “DSL packages are cheaper, performance speeds are faster, and the number of subscribers is growing more quickly than under [common carrier] rules. . . . Since DSL began to shed its [common carrier] obligations, users have flocked to the service.”).

<sup>52</sup> See, e.g., *Wireline Broadband Order; Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al*, WC Docket No. 01-338, Memorandum Opinion and Order, FCC 04-254 (released Oct. 27, 2004); *EarthLink v. FCC*, No. 05-1087, Slip Op. (D.C. Cir., Aug 15, 2006); *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005).