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September 27, 2006

*Via Electronic Delivery*

Ms. Marlene H. Dortch  
Federal Communications Commission  
The Portals, TW-A325  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *Ex Parte* Presentation - WC Dkt. 05-65, *In the Matter of SBC/AT&T Applications for Approval of Transfer of Control*; WC Dkt. 06-74, *In the Matter of Application for Consent to Transfer of Control Filed by AT&T and BellSouth Corporation*

Dear Secretary Dortch:

This letter, on behalf of EarthLink, Inc. (“EarthLink”), responds to the *ex parte* filed by AT&T, Inc. (“AT&T”) on September 20, 2006 in the above-referenced dockets.<sup>1</sup> AT&T’s efforts to revise and substantially eviscerate the merger commitments that it authored and committed to in the *SBC-AT&T Merger Order*<sup>2</sup> are reprehensible. Despite AT&T’s current protests, AT&T fully understood the nature and scope of its promise to offer stand-alone ADSL to all customers. Accordingly, the Commission should clarify now that, no matter how large AT&T becomes, it must fulfill its merger commitments, including the stand-alone ADSL commitment.

EarthLink urges the Commission to clarify immediately that AT&T’s existing stand-alone ADSL commitment requires AT&T to offer stand-alone ADSL service to *all* customers, including Internet Service Providers (“ISPs”) and VoIP providers, as a telecommunications service. Moreover, AT&T’s renegade position on this matter further confirms that any conditional FCC approval that might be granted in the pending AT&T-BellSouth merger review

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<sup>1</sup> Letter from Gary L. Phillips, General Attorney and Assistant General Counsel, AT&T, to Marlene Dortch, FCC Secretary, WC Dkts. 05-65; 06-74 (Sept. 20, 2006) (“AT&T Letter”).

<sup>2</sup> *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, App. F (Conditions) (2005) (“AT&T-SBC Merger Order”) (“Within twelve months of the Merger Closing Date, SBC/AT&T 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...”).

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must be fully and thoroughly explained to discourage AT&T from repeating further anticompetitive noncompliance.

**I. AT&T HAS FAILED TO IMPLEMENT THE STAND-ALONE ADSL SERVICE COMMITMENT**

In the AT&T Letter and the June 30, 2006 AT&T certification to the FCC, AT&T asserts that “AT&T is in full compliance with its stand-alone ADSL . . . commitments . . .”<sup>3</sup> based on AT&T’s introduction of a retail high-speed Internet access service to residential end-users in its 13 state region. At the same time, the AT&T Letter confirms that AT&T refuses to sell stand-alone ADSL to ISPs, including EarthLink. As discussed below, AT&T has reneged on its stand-alone ADSL Service commitment.

**A. ISPs Are “ADSL Customers” Under the Merger Commitment**

The AT&T Letter asserts that “AT&T did not commit to provide stand-alone ADSL service to EarthLink or any other ISP.”<sup>4</sup> There is no such ISP exclusion or limitation in the language of the merger condition, however, and AT&T has not provided support for this dubious proposition. Indeed, the merger condition requires AT&T to offer stand-alone ADSL to any and all “ADSL-capable customers,” and AT&T has treated EarthLink (and many other ISPs) as “customers” of its ADSL services for years. FCC precedent also recognizes that in the context of DSL transmission sales, the ISP is routinely the “customer” of the BOC.<sup>5</sup> Indeed, when it first

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<sup>3</sup> AT&T Letter at 1; *See also*, Letter of Jacqueline Flemming, AT&T, to Marlene Dortch, FCC Secretary, WC Dkt. 05-65 (filed Jun. 30, 2006) (“AT&T Compliance Letter”) (attached certification of Priscilla Hill-Ardoin, Senior Vice President – AT&T Services, Inc., states that “on June 13, 2006, AT&T Inc. introduced an ADSL service offering in each of the thirteen in-region states which does not require customers to also purchase circuit switched voice grade telephone service. As of June 13, 2006, the service was offered, in each of AT&T’s thirteen in-region states, to at least eighty percent of the premises in AT&T’s in-region service territories that are capable of receiving AT&T ADSL service in each of those states.”).

<sup>4</sup> AT&T Letter at 8.

<sup>5</sup> *See, e.g., In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 6 1999 (“Advanced Services Second Report and Order”) (“Incumbent LECs are marketing and providing DSL services . . . to Internet Service Providers who package it as part of a high--speed Internet service”), ¶ 17 (“ . . . DSL services are designed for and sold to Internet Service Providers as an input component to the Internet Service Providers' retail high--speed Internet service.”); *See also, GTE Telephone Operating Cos., Memorandum Opinion and Order*, 13 FCC Rcd. 22466 (1998) (“GTE Telephone Order”) (describing ILEC ADSL service sold to ISP customers). *In re Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Memorandum Opinion and Order*, 17 FCC Rcd. 27000, ¶ 6 (Dec. (footnote continued on next page)

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addressed regulatory issues regarding incumbent LEC ADSL service to ISPs, the Commission noted that

GTE's ADSL service, like other xDSL technology, *enables ISPs and other customers* to provide to their end user subscribers 'the simultaneous transmission of voice dialed calls and high speed data access over a single transmission path . . . at data speeds that far exceed the current widespread method of voice path dial access to ISPs,' thereby reducing the need for subscribers to obtain additional lines for their Internet capabilities.<sup>6</sup>

Moreover, for at least the past four years and continuing today, AT&T's former federal ADSL tariff and then the web-posted ADSL terms and conditions of AT&T-ASI have defined the entity (typically the ISP) purchasing the ADSL service as:

**CUSTOMER** – Any person, firm, partnership, corporation or other entity who subscribes to Service under an arrangement which incorporates, in whole or in part, these Terms and Conditions.<sup>7</sup>

In the *Wireline Broadband* proceeding, SBC even boasted to the FCC of the superior treatment SBC afforded to its ISP customers:

We have consistently demonstrated a *commitment to independent ISPs as customers* and implemented services and process improvements on their behalf beyond what is required by the *Computer Inquiry* rules. For example, in response to requests from independent ISPs, SBC created a wholesale Traffic Aggregation Service (TAS) that allows ISPs to effectively resell broadband Internet access service by entering into an arrangement with SBC's

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31, 2002); *Id.* at n.23 ("ASI sells its DSL transport service primarily to ISPs, including affiliated ISPs, but its tariff states that this service 'may be purchased by any information service provider or carrier to connect to their End User for the purposes [sic] of providing to that End User a retail service that includes high speed DSL.'").

<sup>6</sup> *GTE Telephone Order*, ¶ 9 (1998); *Id.*, at n. 29 ("GTE notes that its ADSL service may also be ordered by businesses, IXCs, and competitive LEC *customers*.")) (emphasis added).

<sup>7</sup> *See*, SBC Advanced Solutions, Inc. d/b/a/ AT&T Advanced Solutions, General Terms and Conditions, at § 1.6 (Version 27.0, effective Aug. 26, 2006), *found at*, <http://www.sbc.com/gen/public-affairs?pid=6291&phase=check>. *Compare with* SBC-ASI, F.C.C. Tariff No. 1, at Sheet 9 (complete base tariff, filed Sept. 9, 2002) ("**CUSTOMER** – Any person, firm, partnership, corporation or other entity who subscribes to Service under the terms and conditions of this Tariff.").

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unregulated ISP affiliate. TAS is currently being purchased by a number of ISPs. SBC also established an Alliance Management Team in July 2000 to identify and resolve cross-regional issues affecting ISPs. We also have offered to distribute the web browser and other software of independent ISPs as part of the customer's DSL start-up CPE kit (when the ISP has purchased CPE from SBC), and to install the ISP's software and perform the authentication process for the ISP as part of our on-site DSL installation.<sup>8</sup>

For AT&T now to contend that ISPs are not "customers" is nothing more than a stunning attempt to deny its own practices and to back out of its express promises.

Notably, AT&T's refusal to acknowledge ISPs as customers also conflicts with a host of FCC precedent making clear that ISPs are treated as "customers" and "end users" for regulatory purposes, including but not limited to federal access services (such as ADSL) and federal USF. Thus, in considering the regulatory treatment of ISPs for access charge purposes, the FCC found that ISP traffic characteristics were "shared by other classes of business customers."<sup>9</sup> Further, as the FCC has noted, for federal USF purposes, carriers "must base their contributions on end-user telecommunications revenues, which generally include revenues derived from Internet Service Providers."<sup>10</sup> Not only does AT&T ignore this and ample other examples that underscore that ISPs have been and remain customers, it provides no precedential or evidentiary support for its dubious interpretation of the stand-alone ADSL merger commitment.

Critically, AT&T's unilateral decision to exclude ISPs from purchasing the stand-alone ADSL service flatly contradicts the reason the Commission accepted the merger condition as a public interest benefit. The condition was intended to provide consumers in SBC's in-region territory, including EarthLink's subscribers, the choice to retain or purchase an ADSL-based broadband Internet access service and also to choose a voice service provider other than AT&T.<sup>11</sup>

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<sup>8</sup> Letter from Jeffry Brueggeman, General Attorney, SBC Communications, Inc. to Marlene Dortch, FCC, CC Docket Nos. 02-33 et al., at 8 (July 31, 2003) (emphasis added).

<sup>9</sup> *In the Matter of Access Charge Reform, First Report and Order*, 12 FCC Rcd. 15982, ¶ 345 (1997).

<sup>10</sup> *Advanced Services Second Report and Order*, n. 44.

<sup>11</sup> *AT&T-SBC Merger Order*, Statement of Commissioner Michael J. Copps ("We require the Applicants to make available stand-alone, or 'naked' DSL. This means consumers can buy DSL without being forced to also purchase voice service. This is good news. If savvy consumers have cut the cord and use only a wireless phone, why should they have to pay for wireline voice (footnote continued on next page)

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Significantly, AT&T's position also conflicts with the stand-alone ADSL practices of Verizon. Indeed, while Verizon is subject to virtually the same stand-alone ADSL merger commitment from the Verizon-MCI merger, Verizon has made its stand-alone ADSL service available to ISPs as a service feature of ADSL service, it has worked with EarthLink to develop ordering and provisioning OSS terms, and both parties are working towards a successful commercial implementation.

In the SBC-AT&T Merger Order, the FCC committed to “to monitor the market and take corrective action if necessary in the public interest” and “to revisit the merger conditions” should the evidence show that “the Applicants are acting to exclude competitors.”<sup>12</sup> The AT&T Letter now confirms that AT&T is affirmatively committed to excluding ISPs and other unaffiliated VoIP providers from competing for AT&T's voice customers. Having filed the AT&T Compliance Letter on June 30, 2006, AT&T's policy of ISP exclusion is final and ripe for the FCC's review. Thus, the public interest requires the Commission to take action, both to protect the American consumer from AT&T's anticompetitive acts and to preserve the integrity of the FCC's merger approval process. Otherwise, AT&T is rewarded each day for its renegade position, and its history of violating merger conditions<sup>13</sup> will continue on in this and future proceedings.

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service they don't even want? Looking forward, this condition is important for the development of VoIP. I also am pleased that the Commission has committed to enforce this condition and issue an annual report addressing anti-competitive conduct in this market. And I hope we will have the good sense to find it anti-competitive if the price for stand-alone DSL is not significantly less than the price for bundled voice and DSL.”); AT&T-SBC Merger Order, Statement of Commissioner Jonathan S. Adelstein ( “The condition was to “create an opportunity for development of competitive Voice Over Internet Protocol (VoIP) and help spur innovative communications technologies...A stand-alone DSL offering is an important contribution to the marketplace...”).

<sup>12</sup> SBC-AT&T Merger Order, ¶¶ 206, 207.

<sup>13</sup> *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd. 19923 (Oct. 9, 2002) (finding that SBC willfully and repeatedly violated a condition of the SBC-Ameritech Merger Order by failing to offer “shared transport in the former Ameritech states under terms and conditions substantially similar to those that it offered in Texas as of August 27, 1999”); *In the Matter of SBC Communications Inc. Apparent Liability for Forfeiture*, Order on Review, 17 FCC Rcd. 4043 (Feb. 25, 2002) (finding that SBC willfully and repeatedly violated the Commission's collocation rules and the terms of the SBC/Ameritech Merger Order, which required SBC to comply with the Commission's collocation rules); *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd. 1397 (Jan. 18, 2002) (finding SBC apparently liable for violation of a condition imposed pursuant to the SBC-Ameritech Merger Order requiring SBC to

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**II. THE WIRELINE BROADBAND ORDER RELIEVED AT&T OF THE COMPUTER INQUIRY COMPULSION TO OFFER TRANSMISSION ON A COMMON CARRIER BASIS. IT DID NOT EXONERATE AT&T FROM FULFILLING ITS SUBSEQUENT VOLUNTARY COMMITMENTS.**

The AT&T Letter (at 9, 10) claims that enforcement of the stand-alone ADSL merger commitment would violate the *Wireline Broadband Order*.<sup>14</sup> This claim, like so many of AT&T's contentions, is erroneous and self-serving. While the *Wireline Broadband Order* lifted certain extant FCC regulations, it did not affect AT&T's ability to make subsequent voluntary merger commitments to the FCC, as it did in the context of the SBC-AT&T merger proceeding.<sup>15</sup>

Specifically, the *Wireline Broadband Order* relieved AT&T of the extant *Computer Inquiry* obligation to offer transmission across its broadband access facilities on a common carrier basis. Instead, the *Wireline Broadband Order* offered AT&T with the choice of offering ADSL service on a common carrier or a private carrier basis.<sup>16</sup> The merger commitment, offered

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offer "shared transport in the former Ameritech states under terms and conditions substantially similar to those that it offered in Texas as of August 27, 1999"); *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd. 1012 (Jan. 18, 2001) (finding SBC Communications, Inc. apparently liable for failing to post notices promptly of premises that ran out of collocation space, in violation of the Commission's collocation rules, and the SBC/Ameritech Merger Order).

<sup>14</sup> AT&T Letter at 9-10.

<sup>15</sup> AT&T also mischaracterizes the nature of its merger commitment, which is not an FCC regulation but a voluntary commitment on the part of the merger applicant. *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, Memorandum Opinion and Order*, 14 FCC Rcd. 14712, ¶ 511 (1999) ("the conditions that we adopt today are in no way intended to define what is required under, for example, sections 251 or 271, and SBC/Ameritech's compliance with these conditions does not signify that it will satisfy its nondiscrimination obligations under the Act or Commission rules... [r]ather, these measures constitute a package of voluntary commitments proposed by the Applicants to resolve issues and concerns that are peculiar to this merger."); *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, Memorandum Opinion and Order*, 12 FCC Rcd. 19985, ¶¶ 177-200 (1997) (allowing applicants to add voluntarily enforceable conditions to their proposed merger via ex parte filings in order to increase the public interest benefit that the FCC had previously found lacking).

<sup>16</sup> As AT&T explained recently to the Third Circuit, the *Wireline Broadband Order* "simply makes clear that, if wireline carriers choose to offer their services on an individualized basis, those services will be classified – by the Commission – as private-carriage services. That choice is entirely consistent with the Supreme Court's decision in *Brand X*, which upheld the

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by AT&T and accepted by the FCC after the adoption of the *Wireline Broadband Order*, reflects AT&T's choice to offer stand-alone ADSL "to all," *i.e.*, as a telecommunications service, and the *Wireline Broadband Order* is clear that carriers offering ADSL service as a telecommunications service will be subject to applicable Title II requirements. Thus, contrary to AT&T's Letter, AT&T's subsequent voluntary commitment to offer stand-alone ADSL to all as a telecommunications service and the FCC's enforcement of such a condition presents absolutely no conflict with the *Wireline Broadband Order*.

### III. AT&T HAS OFFERED ONLY A HIGH-SPEED INTERNET ACCESS SERVICE; IT HAS NOT OFFERED A STAND-ALONE "ADSL SERVICE"

The AT&T Letter also asserts that the deployment of the "AT&T Yahoo! High Speed Internet Service" meets the ADSL stand-alone merger commitment.<sup>17</sup> This assertion is patently false. After the struggling through the *Brand X* case, the *Cable Modem Declaratory Ruling*, and the *Wireline Broadband Order*, one thing should be clear to all, especially AT&T: there is a bright-line distinction in the law between the offering of a transmission service, such as ADSL service, and the offering of an information service, such as high-speed Internet access service.<sup>18</sup>

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Commission's decision to afford cable providers that same choice, and with the Commission's longstanding practice of authorizing carriers to elect between private and common carriage." Intervenor Brief, Time Warner Telecom Inc. v. FCC, Case Nos. 05-4769, 05-5153, 06-1466, 06-1467, at 17 (3d Cir., June 9, 2006).

<sup>17</sup> AT&T Letter at 2 ("Thus, there can be no serious dispute that AT&T is, in fact, complying with the plain language of the stand-alone ADSL commitment.").

<sup>18</sup> Thus, the FCC stressed that if there were an "indifferent holding out" rather than a "collection of individualized arrangements," the broadband transmission services would be deemed a "telecommunications service." *See, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14853, ¶ 103 (2005) ("Wireline Broadband Order"). Indeed, in the *Wireline Broadband Order*, the FCC reaffirmed the viability of the *NARUC I* test, highlighting that if an entity either holds out a service to all indifferently or is under a legal compulsion to do so, it will be deemed to be providing a telecommunications service. *Id.* (citing Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976) ("NARUC I")); *See also, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, ¶ 7 (2002) ("Cable Modem Declaratory Ruling"), *aff'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X, 545 U.S. 967 (2005), (ruling that cable modem service is an "information service" and not a "separate offering of telecommunications service"); ¶ 40 (cable modem services are not telecommunications services because there is no evidence of a "cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be

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The two offerings are not now to be confused, nor the line blurred, for the sake of accommodating AT&T's immediate interests in avoiding its merger commitment.

Moreover, the Commission and courts have recognized for years that "ADSL service" is a transmission service, not an information or end-to-end retail Internet service.<sup>19</sup> As the Commission explained in the *Advanced Services Second R&O*, ISPs "package the DSL service [of incumbent LECs] with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers" and, in this way, "DSL services are designed for and sold to Internet Service Providers as an input component to the Internet Service Providers' retail high-speed Internet service."<sup>20</sup> Logically, the two services are not the same. Thus, the court in *BellSouth Telecomms, Inc. v. Cinergy Communs. Co.*, 297 F. Supp. 2d 946, 950 (W.D. Ky. 2003) noted:

By itself, DSL service is simply a high-speed data transmission (or transport) service. One can conceptualize DSL as the offering of a particularly large pipe for the transmission of data. In order to provide broadband Internet access on a retail basis, one must combine that DSL transmission service (the pipe) with the information routing and processing capabilities (the water running through the pipe) offered by an Internet Service Provider or 'ISP' such as America Online or EarthLink.

The *Wireline Broadband Order* also recognizes that ADSL service is a transmission service that may be offered either as a telecommunications service or as a private carrier service.<sup>21</sup> Importantly, "ADSL service" is never anything more than the offering of mere transmission; and

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effectively available directly to the public."); *See also, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("What cable companies providing cable modem service and telephone companies providing telephone service 'offer' is Internet service and telephone service respectively – the finished services, though they do so using (or 'via') the discrete components composing the end product, including data transmission. Such functionally integrated components need not be described as distinct 'offerings.'").

<sup>19</sup> *See, supra*, n. 5.

<sup>20</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶¶ 3, 17 (1999).

<sup>21</sup> *See, Wireline Broadband Order*, ¶ 106 ("The previous orders upon which commenters rely assumed, correctly in each instant, that the offering of DSL transmission on a common carrier basis was a telecommunications service.") (*citing Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 21 (1999); *GTE Telephone Order*, ¶ 1 (1998)).

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so, AT&T's "High-Speed Internet Service" – an information service offering – cannot possibly be the ADSL Service offering required in the merger commitment.

In addition, the terms of the merger commitment require AT&T to offer the stand-alone ADSL service as a telecommunications service. Under the merger commitment, AT&T volunteered to offer stand-alone ADSL service for a fee to all ADSL-capable customers. As the FCC stated, "After meeting the implementation date in each state, SBC/AT&T will continue deployment so that it can offer the service to all ADSL-capable premises in its in-region territory within twelve months of the Merger Closing Date."<sup>22</sup> Following the time-tested principles enunciated in *NARUC I*,<sup>23</sup> which were reaffirmed by the FCC in the *Wireline Broadband Order*, AT&T's offering of a transmission service "to all," *i.e.*, in an indiscriminate manner, is a legally binding commitment to offer a telecommunications service.<sup>24</sup> For the same reasons, AT&T committed to offer a "telecommunications service" under the Communications Act definition because: (i) the stand-alone ADSL service is a transmission service, as discussed above; (ii) for a fee; and (iii) to the public, or to such classes of users as to be effectively available.<sup>25</sup>

As a telecommunications service, it is improper for AT&T to refuse to offer the stand-alone ADSL service to EarthLink, any other ISP, or *any* customer, especially since its refusal is undoubtedly based on its motive to drive out in-region voice competition. Well-established FCC precedent requires an interstate wireline telecommunication carrier not to impose unreasonable restrictions on the sale of its service, including restrictions against sales to ISP competitors.<sup>26</sup>

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<sup>22</sup> *SBC-AT&T Merger Order*, fn. 576 (emphasis added).

<sup>23</sup> *NARUC I* at 642 (applying a two-part analysis to determine if a communications service offering is subject to Title II common carrier regulation. The Commission first inquires "whether there will be any legal compulsion . . . to serve the [public] indifferently." Next, if the Commission finds that neither the statute nor the public interest compel the service to be offered on a common carriage basis, the Commission examines "whether there are reasons implicit in the nature of [the provider's] operations to expect an indifferent holding out to the eligible user public.").

<sup>24</sup> The FCC concluded in the *Wireline Broadband Order* that carriers may choose to offer certain types of broadband Internet Access transmission as telecommunications services. *See, Wireline Broadband Order*, ¶ 90 ("We therefore conclude that providers of wireline broadband Internet access service that offer that transmission as a telecommunications service after the effective date of this Order may do so on a permissive detariffing basis.").

<sup>25</sup> 47 U.S.C. § 153(46).

<sup>26</sup> *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, 16 FCC Rcd. 7418, ¶ 46 (2001) ("the Commission has already found that where there is an incentive for a carrier to discriminate unreasonably in its provision of basic transmission services (footnote continued on next page)

#### IV. AT&T'S PRICING ANALYSIS IS MISGUIDED AND FOCUSES ON THE WRONG QUESTION

The AT&T Letter (at 5-8) also expends much effort attempting to show that AT&T's "No Voice" pricing is comparable to that of other High-Speed Internet providers. As discussed below, AT&T's analysis is hopelessly confused. More importantly, however, this analysis is also a "red herring." A comparison of Internet access service pricing is not, and never has been, central to the question of AT&T's compliance with the letter of the stand-alone ADSL merger commitment. EarthLink has consistently maintained that AT&T's outrageous pricing for its "No Voice" service evidences AT&T's willingness to evade the spirit of the stand-alone obligation in addition to backtracking on the plain words of its promise. As discussed above, AT&T should be held accountable to the commitment it made and the Commission relied upon in the SBC-AT&T Merger Order.

To clear the record, however, EarthLink points out just a few of AT&T's inapt and misleading comparisons. First, while AT&T asserts that the price for its No Voice Internet service is comparable to that offered by cable providers, AT&T neglects to mention the significant differences in download speeds between the two services (*i.e.*, AT&T's download speed of up to 1.5 Mbps versus cable modem services with download speeds of 5 to 7 Mbps), entirely defeating the efficacy of the price comparison.<sup>27</sup> Likewise, in comparing its No Voice Internet service with that offered by Verizon, AT&T has badly misrepresented Verizon's pricing plans. In fact, Verizon's high-speed Internet and circuit-switched voice bundle price is priced at approximately \$55/month (*i.e.*, Verizon Freedom Essentials for \$39.95/month plus Verizon promotional broadband Internet for \$14.95/mo), versus Verizon's stand-alone offering for \$19.95/month. Unlike Verizon's pricing, AT&T's pricing of No Voice Internet service underscores the company's apparent goal of discouraging stand-alone broadband services of any

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used by competitors to provide enhanced services, section 202 acts as a bar to such discrimination."); *See also, Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, Order on Reconsideration*, 12 FCC Rcd. 15014, ¶ 72 (1997) ("our long-standing policies barring prohibitions on resale and restrictive eligibility requirements will continue in full force to the same extent as prior to detariffing"); *Resale and Shared Use of Common Carrier Services and Facilities, Report and Order*, 60 FCC 2d 261, 271 (1976), *modified on other grounds, Resale and Shared Use Reconsideration Order*, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, Report and Order*, 83 FCC 2d 167, ¶ 70 (1980).

<sup>27</sup> Hypocritically, the AT&T Letter chided EarthLink's comparison of two broadband services with far less download speed disparity (*i.e.*, Verizon 768 Kbps service compared with AT&T's 1.5 Mbps service). AT&T Letter at 5.

kind.<sup>28</sup> In addition, while AT&T argues in the AT&T Letter (at 6) that the prices referenced by EarthLink exclude regulatory charges and other fees, AT&T's pricing comparison is far worse by including such additional costs only on the bundled package and not the stand-alone service, and thereby deliberately skewing the analysis in AT&T's favor.

The AT&T Letter also wrongly claims that the stand-alone ADSL commitment allows "rates [to be] determined solely by AT&T."<sup>29</sup> When AT&T ultimately fulfills its merger commitment, however, it is obliged to offer a telecommunications service for the reasons discussed above. Just like any other telecommunications service, AT&T does not have unfettered pricing discretion; rather, it is subject to the "just and reasonable" standard of Section 201(b) of the Act, as well as to the principles of cost-based pricing under Title II of the Act. Comparisons to cable modem pricing, therefore, do not reflect those appropriate legal constraints by which AT&T has agreed to offer stand-alone ADSL. AT&T, unlike cable modem providers, agreed to offer a service indiscriminately, to all customers. For this reason, Commissioner Copps specifically warned AT&T in the merger context that "if the price for stand-alone DSL is not significantly less than the price for bundled voice and DSL" the Commission should find such pricing "anti-competitive."<sup>30</sup> Commissioner Adelstein also stressed the importance of ensuring the stand-alone ADSL Services are available "at reasonable prices and under fair terms."<sup>31</sup>

Perhaps the most telling on the issue of pricing, however, is a comparison with the manner that Verizon has implemented its similar stand-alone ADSL obligation. Verizon offers the service in a manner that requires ISPs (and, ultimately, consumers) to pay no additional fees for stand-alone ADSL. Instead, the stand-alone function is a service feature option of each ADSL service arrangement ordered. To fulfill its merger promise, AT&T should mimic the Verizon market standard and eliminate excessive additional fees for a stand-alone ADSL service offering.

**V. AT&T MUST COMPLY WITH THE TERMS OF THE MERGER CONDITION THAT IT DRAFTED, SUBMITTED, AND ACCEPTED**

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<sup>28</sup> Despite the merger commitment, AT&T Spokesman Andy Morgan explained that the stand-alone Internet pricing was part of AT&T's corporate strategy "to get their customers to subscribe to as many services as possible . . . ." "AT&T offers unbundled DSL as part of FCC deal," The Journal Record (Oklahoma City, OK) (June 21, 2006).

<sup>29</sup> AT&T Letter at 3.

<sup>30</sup> SBC-AT&T Merger Order, Statement of Commissioner Michael J. Copps.

<sup>31</sup> *Id.*, Statement of Commissioner Adelstein.

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Now is the time for the Commission to clarify and enforce the plain terms of AT&T's stand-alone ADSL merger commitment, as described above. AT&T's lawyers deliberately drafted and submitted the merger condition language to the FCC,<sup>32</sup> and the FCC adopted SBC's voluntary commitment language without a single change or edit; AT&T cannot now feign ignorance or ambiguity. Rather, when AT&T closed the SBC-AT&T merger in December 2005, it thereby became legally bound to fulfill the voluntary conditions of the FCC's merger approval order. If AT&T had been unsure of the condition's meaning, the burden rests squarely with AT&T to have sought FCC clarification well before this time, and not to implement in a self-serving and expedient manner and beg forgiveness later.

Pursuant to the Commission's rules, one copy of this memorandum is being filed electronically in each of the above-referenced dockets for inclusion in the public record. Please do not hesitate to contact the undersigned directly if you have any questions.

Respectfully submitted,



Donna N. Lampert  
Mark J. O'Connor  
*Counsel for EarthLink, Inc.*

cc: Chairman Kevin Martin  
Commissioner Michael Copps  
Commissioner Jonathan Adelstein  
Commissioner Deborah Tate  
Daniel Gonzalez  
Michelle Carey  
Jessica Rosenworcel  
Scott Deutchman  
Scott Bergmann  
Ian Dillner  
Sam Feder  
Thomas Navin

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<sup>32</sup> Compare, Letter of James C. Smith, SBC, to FCC Chairman Kevin Martin, WC Dkt. 05-65, at 4 (filed Oct. 31, 2005), with, SBC-AT&T Merger Order, App. F.

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Donald Stockdale  
Nicholas Alexander  
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