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Via Electronic Submission

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th 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 latest attempt by EarthLink, Inc. (EarthLink) to mischaracterize the terms of the stand-alone ADSL commitment that AT&T made in connection with the above-referenced merger between SBC Communications Inc. and AT&T Corp.¹ EarthLink now claims that the stand-alone ADSL commitment does not apply to AT&T's provision of broadband Internet access service to retail customers. Instead, EarthLink alleges AT&T's stand-alone ADSL commitment relates only to the provision of wholesale stand-alone ADSL *transmission* service to ISPs, which EarthLink claims AT&T must provide as a "telecommunications service" subject to the just and reasonable pricing standard of section 201(b) of the Communications Act.²

Aside from lacking any textual or legal support, EarthLink's claim, if true, would mean that AT&T has absolutely no obligation whatsoever to offer stand-alone ADSL Internet access service to its customers and, therefore, AT&T could discontinue this service today without violating the stand-alone ADSL condition in the *SBC-AT&T Merger Order*.³ As discussed below, the Commission obviously did not intend such a result when it adopted the stand-alone ADSL

¹ Letter from Donna Lampert, Counsel for EarthLink, to Marlene Dortch, FCC, WC Docket No. 06-74 (Sept. 27, 2006) (*EarthLink Sept. 27 Ex Parte*). See also Letter from Donna Lampert, Counsel for EarthLink, to Marlene Dortch, FCC, WC Docket No. 06-74 (Sept. 12, 2006) (*EarthLink Sept. 12 Ex Parte*); Letter from Gary Phillips, AT&T, to Marlene Dortch, FCC, WC Docket No. 06-74 (Sept. 20, 2006) (*AT&T Sept. 20 Ex Parte*) (responding to *EarthLink Sept. 12 Ex Parte*).

² *EarthLink Sept. 27 Ex Parte* at 6-9.

³ *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*).

condition and EarthLink's arguments to the contrary should be soundly rejected. In addition, although EarthLink's *Sept. 12 Ex Parte* railed against the allegedly "anticompetitive" and "unreasonable" pricing of AT&T's stand-alone ADSL service, EarthLink now effectively drops that claim. It concedes that "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" and suggests that AT&T's stand-alone ADSL pricing should be governed by a "market standard."⁴ Given these concessions, the Commission should summarily dismiss EarthLink's arguments without further consideration.

I. The Stand-Alone ADSL Service Commitment Does Not Require AT&T to Offer Stand-Alone ADSL Transmission Service to EarthLink on a Common Carrier Basis as a "Telecommunications Service."

As AT&T previously explained in its *Sept. 20 Ex Parte*, the text of its stand-alone ADSL commitment states that, within twelve months of the merger closing date (November 18, 2005), 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."⁵ The commitment also requires AT&T to continue to offer stand-alone ADSL in a state for two years after the "implementation date" for that state, which is the date on which AT&T can offer the service to 80 percent of the "ADSL-capable premises" in AT&T's territory in the state. In adopting AT&T's stand-alone ADSL commitment as a condition in the *SBC-AT&T Merger Order*, the Commission observed that the condition was designed to "benefit[] consumers."⁶ As such, the Commission stated that it would "monitor all *consumer-related* problems concerning this service, including reviewing *consumer* complaints and other information."⁷ Commissioners Copps and Adelstein further confirmed the consumer-oriented nature of AT&T's stand-alone ADSL commitment in their separate statements. As Commissioner Copps pointed out, AT&T's commitment was "good news" because it "means *consumers* can buy DSL without being forced to also purchase voice service."⁸ Commissioner Adelstein similarly remarked that "[c]onsumers deserve the option of choosing the combination of service that fits their needs" and AT&T's commitment "will substantially expand the options available to residential and business *consumers*."⁹

⁴ *EarthLink Sept. 27 Ex Parte* at 10, 11.

⁵ See *AT&T Sept. 20 Ex Parte* at 2-3, 8. See also Letter from James C. Smith, SBC, to Kevin Martin, FCC, WC Docket No 05-65, at 4 (Oct. 31, 2005) (*AT&T Commitment Letter*).

⁶ *SBC-AT&T Merger Order* ¶ 207 (emphasis added).

⁷ *SBC-AT&T Merger Order* ¶ 207 (emphasis added).

⁸ *Statement of Commissioner Michael J. Copps, Concurring*, WC Docket No. 05-65, at 2 (emphasis added).

⁹ *Statement of Commissioner Jonathan S. Adelstein, Concurring*, WC Docket No. 05-65, at 1 (emphasis added).

To satisfy its stand-alone ADSL service commitment, AT&T introduced a new stand-alone ADSL-based broadband Internet access service in June 2006, which is “available to customers who do not subscribe to AT&T voice services.”¹⁰ AT&T also informed the Commission that, as of June 13, 2006, it had made this stand-alone ADSL service available to at least 80 percent of ADSL-capable customer premises in its in-region territory.¹¹ Thus, more than five months ahead of schedule, AT&T had taken all of the steps necessary to satisfy its stand-alone ADSL commitment.

Despite the Commission’s clear focus on consumers in adopting the stand-alone ADSL service condition and AT&T’s timely efforts to satisfy that condition, EarthLink now claims that the stand-alone ADSL service referenced in AT&T’s merger commitment is not a consumer product at all. Instead, EarthLink maintains that AT&T’s commitment concerns the provision of wholesale stand-alone ADSL *transmission* service to EarthLink and other ISPs.¹² In EarthLink’s view, the term “ADSL” necessarily refers to a wholesale transmission service, rather than ADSL Internet access service.¹³ Thus, EarthLink asserts that the stand-alone ADSL Internet access service currently offered by AT&T “cannot possibly be the ADSL Service offering required in the merger commitment.”¹⁴

In making these claims, EarthLink conveniently overlooks the actual text of AT&T’s commitment and the stand-alone ADSL condition adopted in the *SBC-AT&T Merger Order*, neither of which contains any references to stand-alone ADSL “transmission” services or wholesale offerings for ISPs. By contrast, just two months earlier in the *Wireline Broadband Order*, where the Commission addressed the regulatory treatment of stand-alone transmission services used in the provision of broadband Internet access, it expressly and repeatedly used the term “transmission” to describe these services.¹⁵ Given these explicit references to “transmission” services in the *Wireline Broadband Order* and the complete absence of any such

¹⁰ See *AT&T Delivers Greater Consumer Choice with New Wireless, VoIP and High Speed Internet Offers*, AT&T News Release (June 30, 2006).

¹¹ See Letter from Jacquelyne Flemming, AT&T, to Marlene Dortch, FCC, WC Docket No. 05-65 (June 30, 2006).

¹² *EarthLink Sept. 27 Ex Parte* at 7-9.

¹³ *EarthLink Sept. 27 Ex Parte* at 7-9.

¹⁴ *EarthLink Sept. 27 Ex Parte* at 9.

¹⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order, FCC 05-150 ¶¶ 3 n.5 (released Sept. 23, 2005) (*Wireline Broadband Order*) (“Throughout this Order, we refer to the transmission underlying wireline broadband Internet access service as the ‘transmission component.’”). See also *id.* ¶ 4 (“the transmission component of wireline broadband Internet access is not a telecommunications service”), ¶ 62 (“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.”) (emphasis in original), ¶ 104 (“we conclude that wireline broadband Internet access service does not include the provision of a telecommunications service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers.”)

references in the *SBC-AT&T Merger Order's* stand-alone ADSL condition, it is simply not credible for EarthLink to assert that the Commission imposed a condition on AT&T to offer a wholesale stand-alone ADSL transmission service to ISPs.

Moreover, assuming *arguendo* EarthLink is correct that AT&T's stand-alone ADSL commitment does not concern broadband Internet access service, then AT&T would have no obligation whatsoever to offer stand-alone ADSL Internet access service to any of its retail customers. Indeed, under EarthLink's theory, AT&T could withdraw its current stand-alone ADSL service from the marketplace today without running afoul of the stand-alone ADSL condition in the *SBC-AT&T Merger Order*. Of course, AT&T has no plans to do so because the *SBC-AT&T Merger Order* requires AT&T to provide such a service and AT&T's current stand-alone ADSL offering fully satisfies the *Order's* requirements. We raise this possibility merely to illustrate the absurd results that follow from EarthLink's erroneous and self-serving interpretation of AT&T's stand-alone ADSL commitment.

EarthLink's assertion that AT&T is required to offer stand-alone ADSL transmission service on a common carrier basis as a "telecommunications service" fares no better. According to EarthLink, even though the Commission authorized incumbent local exchange carriers to provide the transmission component of wireline broadband Internet access (*e.g.*, ADSL transmission service) on a private carriage basis in the *Wireline Broadband Order*, AT&T made a "voluntary commitment" to offer stand-alone ADSL transmission service as a "telecommunications service" subject to the pricing standards of section 201(b) of the Act.¹⁶ In support of this argument, EarthLink points to a footnote in the stand-alone ADSL condition of the *SBC-AT&T Merger Order*, which states that after meeting the implementation date in each state, AT&T will "continue deployment" of stand-alone ADSL service "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."¹⁷

Contrary to EarthLink's misguided allegations, nothing in this footnote or anywhere else in the *SBC-AT&T Merger Order* suggests that AT&T committed to offer stand-alone ADSL service on a common carrier basis as a "telecommunications service." As an initial matter, for the reasons stated above, the commitment does not apply to ADSL *transmission* service at all. It applies to ADSL Internet access service. Moreover, the footnote merely specifies *where* (to all ADSL-capable premises in its in-region territory) and *when* (within twelve months of the Merger Closing Date) AT&T will deploy stand-alone ADSL service. The footnote does not state that AT&T will offer the service to all customers indiscriminately at the same rates, terms and conditions.¹⁸ In fact, neither AT&T's stand-alone ADSL commitment nor the *SBC-AT&T Merger*

¹⁶ *EarthLink Sept. 27 Ex Parte* at 6-7, 11.

¹⁷ *SBC-AT&T Merger Order*, Appendix F n.576.

¹⁸ *See NARUC v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("the characteristic of holding oneself out to serve *indiscriminately* appears to be an essential element, if one is to draw a coherent line between common and private carriers. . . . it is difficult to envision a sensible line between them which does not turn on the *manner and terms* by which they approach and deal with their customers.") (emphasis added).

Order remotely suggest that the rates, terms and conditions applicable to AT&T's stand-alone ADSL service are subject to any regulatory limitations or restrictions. To the contrary, the Commission stated just the opposite: "[w]e expect that the terms and conditions for these services will reflect the underlying competitiveness of the market."¹⁹ Given this statement, the fact that the Commission had expressly eliminated any obligation for AT&T and other ILECs to offer broadband Internet access transmission services on a common carriage basis just two months before the *SBC-AT&T Merger Order*, and the fact that the terms "common carriage" and "telecommunications service" appear nowhere in AT&T's commitment or in the *SBC-AT&T Merger Order's* stand-alone ADSL condition, EarthLink cannot be taken seriously when it claims that AT&T is required to offer stand-alone ADSL service on a common carriage basis as a telecommunications service.

Finally, in a last gasp effort to re-write the terms of AT&T's stand-alone ADSL commitment, EarthLink once again claims that it is an "ADSL customer" and, therefore, it is entitled to purchase stand-alone ADSL transmission service from AT&T.²⁰ To bolster this position, EarthLink quotes selected passages from Commission orders, AT&T tariffs and service guides, and comments from the former SBC, each of which generically suggests that ISPs may be "customers" of certain services offered by AT&T or other ILECs.

This proves nothing. AT&T did not commit to offer stand-alone ADSL service to anyone who might, in a generic sense, be considered a "customer." Rather, AT&T committed that it would offer stand-alone "ADSL service to *ADSL-capable customers*" in its in-region territory "without requiring such customers to also purchase circuit switched voice grade telephone service."²¹ 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.²² EarthLink, however, is *not* an "ADSL-capable customer" itself and it is not requesting stand-alone ADSL service at its own "ADSL-capable premises." Instead, EarthLink is an ISP seeking to *serve* ADSL-capable customers at the customers' own ADSL-capable premises in AT&T's region.

Moreover, at the time AT&T made the stand-alone ADSL commitment, it required retail customers to "purchase circuit switched voice grade telephone service" if they wanted ADSL Internet access service from AT&T. AT&T did not, however, require ISPs to "purchase circuit switched voice grade telephone service" in order to obtain an ADSL-based transmission service from AT&T. Thus, the only logical interpretation of the stand-alone ADSL commitment is that it altered the manner in which AT&T provides ADSL Internet access service to retail customers,

¹⁹ *SBC-AT&T Merger Order* ¶ 207.

²⁰ *EarthLink Sept. 27 Ex Parte* at 2-5.

²¹ AT&T Commitment Letter at 4 (emphasis added). *See also SBC-AT&T Merger Order*, Appendix F.

²² AT&T Commitment Letter at 4 (emphasis added). *See also SBC-AT&T Merger Order*, Appendix F.

who were previously required to purchase circuit switched voice grade telephone service together with their ADSL Internet access service before AT&T implemented the stand-alone ADSL commitment. Accordingly, contrary to EarthLink's erroneous claims, the plain language of AT&T's stand-alone ADSL commitment does not require AT&T to provide stand-alone ADSL service to EarthLink.

II. EarthLink Concedes that AT&T's Stand-Alone ADSL Pricing Does Not Inhibit VoIP Competition.

In its *Sept. 12 Ex Parte*, EarthLink berated AT&T for the purportedly "anticompetitive" and "unreasonable" pricing of AT&T's stand-alone ADSL service, which was allegedly inhibiting VoIP competition, and demanded that the Commission take action to redress this supposed violation of the stand-alone ADSL commitment.²³ As evidence of this so-called anticompetitive and unreasonable pricing, EarthLink produced a chart ostensibly showing that AT&T charges more for stand-alone ADSL service than for bundles of ADSL plus voice service.²⁴ In response, AT&T provided a host of detailed information conclusively demonstrating that EarthLink had grossly understated the cost of the ADSL-voice bundles. AT&T also showed that its stand-alone ADSL service was priced competitively with stand-alone broadband Internet access services from other providers.²⁵

EarthLink's *Sept. 27 Ex Parte* largely retreats from its earlier diatribe about AT&T's stand-alone ADSL pricing. Instead, EarthLink offers a series of incoherent and self-contradictory arguments. For example, EarthLink claims that "the most telling on the issue of pricing . . . is a comparison with the manner that Verizon has implemented its similar stand-alone ADSL obligation."²⁶ At the same time, however, EarthLink concedes that a "comparison of Internet access pricing is not, and never has been, central to the question of AT&T's compliance with the letter of the stand-alone merger commitment."²⁷ Similarly, while EarthLink argues that AT&T's stand-alone ADSL prices should be subject to the just and reasonable standard of section 201(b), a few sentences later EarthLink suggests that such prices should instead be governed by a "market

²³ *EarthLink Sept. 12 Ex Parte* at 1, 3, 6-7.

²⁴ *EarthLink Sept. 12 Ex Parte* at 3.

²⁵ In its *Sept. 20 Ex Parte*, AT&T advised the Commission that the prices for broadband Internet access service (including AT&T's own prices) would likely change in response to competitive forces in the dynamic broadband marketplace. *AT&T Sept. 20 Ex Parte* at 5 n.26. Effective October 3, 2006, AT&T restructured the pricing of its ADSL services. Specifically, AT&T's 1.5 Mbps ADSL service is now available for \$19.99 per month when bundled with AT&T voice service, with no term commitment and no pre-scheduled price increase after 12 months of service. AT&T's 1.5 Mbps stand-alone ADSL service remains \$44.99 per month.

²⁶ *EarthLink Sept. 27 Ex Parte* at 11.

²⁷ *EarthLink Sept. 27 Ex Parte* at 10 (emphasis added).

standard,” which, according to EarthLink, is reflected in the pricing structure Verizon applies to its stand-alone ADSL service.²⁸

In addition to repeatedly contradicting itself about the relevance of Verizon’s stand-alone ADSL service, EarthLink goes on to significantly mischaracterize the pricing of that service. EarthLink proceeds to tell the Commission that Verizon offers stand-alone ADSL at the unqualified rate of “\$19.95/month.”²⁹ As AT&T previously explained to both EarthLink and the Commission, however, Verizon’s \$19.95 rate is a promotional rate that is only available for the first three months of service, after which the rate increases to \$29.95 per month with a twelve-month commitment, or \$37.95 per month on a month-to-month basis.³⁰

EarthLink’s stubborn refusal to acknowledge these important details is telling. Indeed, EarthLink’s entire effort to disparage AT&T’s stand-alone ADSL service has been premised on a gross distortion of both the facts and the law. As explained above and in AT&T’s *Sept. 20 Ex Parte*, AT&T’s stand-alone ADSL service is fully compliant with its stand-alone ADSL commitment and EarthLink’s claims to the contrary are based on a fundamental misrepresentation of the plain language of that commitment. Accordingly, the Commission should reject EarthLink’s arguments and expeditiously approve the AT&T-BellSouth merger.

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

Sincerely,

/s/
Jack Zinman

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

²⁸ *EarthLink Sept. 27 Ex Parte* at 11 (emphasis added). EarthLink also quibbles about a few elements of the pricing data presented by AT&T. For example, EarthLink claims that AT&T omitted regulatory fees and taxes from the cost of its stand-alone ADSL service while including such fees and taxes in its bundled packages, thereby inflating the cost of its bundled packages. *EarthLink Sept. 27 Ex Parte* at 11. EarthLink is just plain wrong -- AT&T expressly stated that it calculated the costs for bundled packages of ADSL and voice service “without including any regulatory fees or taxes.” *AT&T Sept. 20 Ex Parte* at 7.

²⁹ *EarthLink Sept. 27 Ex Parte* at 10.

³⁰ *AT&T Sept. 20 Ex Parte* at 5.