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April 25, 2005

**VIA ECFS**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
The Portals  
TW-A325  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

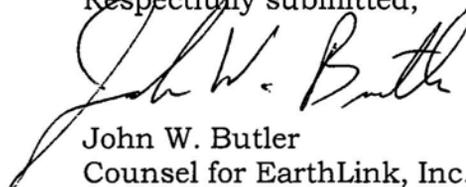
Re: In the Matter of SBC Communications Inc. and  
AT&T Corp. Application for Approval of Transfer  
of Control; WC Docket No. 05-65

Dear Ms. Dortch:

Please find attached the Petition to Deny and Request for Adjustment to the Schedule of EarthLink, Inc. for filing in the above-referenced proceeding.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,



John W. Butler  
Counsel for EarthLink, Inc.

JWB:jmb

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
SBC Communications Inc. and	)	WC Docket No. 05-65
AT&T Corp. Applications for	)	
Approval of Transfer of Control	)	
	)	

**Petition to Deny of EarthLink, Inc.  
And Request for Adjustment to the Schedule**

EarthLink, Inc. (EarthLink), a nationwide Internet service provider (ISP) with over 5 million customers, 1.5 million of which are broadband customers, files this Petition to Deny in accordance with the schedule set forth in the Commission's Public Notice dated March 11, 2005. For the reasons set forth more fully below, the Application as submitted fails in several material respects to provide the factual information necessary to allow interested parties to comment meaningfully or to allow the Commission to conduct the required analysis under sections 214(a) and 310(d) of the Communications Act and section 2 of the Cable Landing License Act. Inasmuch as the burden is on the Applicants to demonstrate that the merger is in the public interest, the merger would have to be denied on the current record. In light of the Commission's pending request to the Applicants for additional information, EarthLink urges the Commission to schedule an additional round of comments and petitions to deny to be filed within four weeks of the Applicants' complete production of the information sought by the Commission in its April 18, 2005, request to Applicants. Pending receipt of the information necessary for parties and the Commission to evaluate the Application properly, EarthLink provides

below several observations regarding the information and arguments submitted by the Applicants to date.

**A. The Market Analysis Provided By the Applicants Is Inadequate.**

As an ISP, EarthLink's primary concern with the proposed merger is its effect on the availability of transmission services that EarthLink requires in order to serve its customers. The two primary classifications into which transmission facilities used for Internet access have traditionally have been put are "last mile" transmission and "backbone" transmission. In addition, there is a "middle mile" transmission link (special access), used to connect ISP points of presence to one another and to the backbone, that is an essential component of end-to-end Internet connectivity. As is discussed further below, the Application is essentially silent on AT&T's participation in the special access market. With respect to last mile and backbone facilities, each of the parties to the merger has more of one type of asset than the other. SBC is rich in last mile assets, while AT&T is rich in backbone assets. That the two networks today are largely complementary rather than overlapping with respect to these two types of facilities, however, does not obviate the need for careful consideration of the competitive effects of the merger. This is the case for two primary reasons.

First, while the networks do not overlap extensively, there is overlap in the backbone portion, and the analysis presented in the Application appears to materially underestimate the amount of backbone concentration that will result from the merger. Second, and probably more important, as the Applicants themselves suggest, it is not at all clear given developments in the telecommunications industry that the "last mile," "special access," and "backbone" components of the end-to-end connectivity that is

necessary for the Internet to function constitute separate and distinct product markets for the purposes of competition analysis. If in fact the relevant product market is, as Applicants suggest, something more like “end-to-end connectivity,” then the merged entity would be the dominant -- indeed the only -- player in that market, at least in SBC territory. That circumstance in turn presents competitive and public interest concerns that the Applicants neither acknowledge nor address. Until those issues are addressed, it is impossible for the Applicants to satisfy their burden of proof. We address these issues in turn below.

1. *The Application Almost Certainly Understates the Increase in Backbone Concentration.*

For purposes of analyzing the impacts of the merger on backbone concentration, the Application relies almost exclusively on the Declaration of Marius Schwartz. That declaration suffers from a number of shortcomings, each of which may mask substantial competitive effects. Those combined unaddressed competitive effects may be material, and they require additional scrutiny by the Commission.

As Dr. Schwartz correctly summarizes, the concern with respect to the backbone in past transactions has been that one or more entities could aggregate sufficient market power to be in a position to discriminate against other backbone providers.<sup>1</sup> Dr. Schwartz, however, speaks only to the concern that the backbone would “tip,” so as to allow a single player to set the terms for all other backbone players.<sup>2</sup> Although that is a concern here, it is not necessary for the balance to get that far out of kilter in order to produce substantial competitive problems. Instead, there is a less drastic but equally real

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<sup>1</sup> See Schwartz Decl. ¶¶14-17.

<sup>2</sup> *Id.* ¶19.

problem when relative traffic volumes of backbone carriers reach a proportion where the larger carriers will no longer “peer,” or provide settlement-free transport to other carriers. The particular nature of that concern is well described by the Application itself. In his Declaration, Christopher Rice states that:

Currently (and historically) internet traffic is exchanged between the networks at a limited number of public peering points, because SBC is so much smaller than AT&T in internet traffic that SBC does not qualify as a Tier 1 carrier, and therefore is not permitted a direct peering relationship with AT&T. . . . Integrating the two networks will allow us to move SBC’s internet-bound traffic (both domestic-bound and international-bound) onto AT&T’s network, achieving greater economies of scale, and significantly allowing us to take on AT&T’s Tier 1 status. This status will allow us to hand off internet traffic on a direct peering basis, and therefore more efficiently from an engineering standpoint, and also without our paying to hand off that internet traffic to other carriers. This will increase efficiency by up to 25% to 50% over current traffic handling.<sup>3</sup>

Emphasizing the importance of the cost savings realized by being able to peer rather than having to pay transit fees, Mr. Rice states later in his Declaration that:

In addition, we will reduce the amount of traffic for which we have to pay other carriers for transiting our traffic as it moves from our network to another network. For example, we currently use Sprint, Level3 and WilTel (but not AT&T) for transit traffic. Much of that transit traffic will move onto the AT&T network, reducing the fees we currently pay these other carriers, and resulting in real savings.<sup>4</sup>

Reading the Rice and Schwartz Declarations together highlights several points that warrant further examination by the Commission. First, it is noteworthy that AT&T does not today peer with SBC. According to Table 3 of Dr. Schwartz’ Declaration (the only table that shows relative market shares by name of companies other than AT&T), AT&T has a backbone revenue share of 15%, while SBC has a share of 5% -- a 3:1 ratio. At that ratio, AT&T will not peer with SBC. Post-merger, according to Table 3, the share

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<sup>3</sup> Rice Decl. ¶7-8.

<sup>4</sup> *Id.* ¶16.

of the combined company will be 20%, a share that is more than three times as large as the share of any other companies except MCI and Sprint. MCI, of course, is proposed to be acquired by Verizon or Qwest. If current traffic ratio requirements for Tier 1 peering were carried forward after the SBC/AT&T merger, one would expect the merged company to peer only with Sprint and the merged Verizon (Qwest)/MCI entity. All others would pay transit, which would increase the cost of doing business not only for those backbone carriers, but more importantly for the customers of those backbone carriers. EarthLink, for example, today peers with some second and third tier backbone providers, but also purchases transit from Level(3). Table 3 of Dr. Schwartz' Declaration shows Level(3)'s revenue share at 4%, presumptively too small to peer with a merged SBC/AT&T.<sup>5</sup> Increases in transit costs to ISPs like EarthLink resulting from the merged company's refusal to peer with the ISP's transit provider could create a barrier to effective competition in the Internet access service market. Outside of the Tier 1 peering effects, increased concentration and unbalancing of market shares in the Tier 1 backbone will also increase the incentive and opportunity of the merged firm to increase transit prices to second and third tier backbone providers. That result would also increase costs to major ISPs like EarthLink, thereby threatening competition in the retail Internet access and information services markets in which both Applicants participate today.

Another shortcoming in Dr. Schwartz' calculation of market shares is the impact of the planned diversion of SBC's traffic off of its current backbone transit carriers

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<sup>5</sup> Given that Level(3) is today a Tier 1 peering carrier, either the revenue shares in Table 3 do not correlate directly to the traffic shares in Table 2, or there are other factors at work in determining what companies peer in Tier 1. Without the company names for the figures in Table 2, it is impossible to understand how the two charts relate to one another.

(Sprint, Level(3) and WilTel)<sup>6</sup> and onto the AT&T backbone. That effect is two-fold, and consists of a reduction in the market shares of Sprint, Level(3) and WilTel, and a corresponding increase in the market share of AT&T (and thus the merged firm). The magnitude of the increase to the AT&T share will equal the sum of the shares lost by the three other carriers. Given that Sprint and Level(3) are currently Tier 1 peers, the relative changes in their market shares from the shift of SBC's traffic will directly affect the balance of traffic in the top tier, further increasing the chances that the merged SBC/AT&T will choose to peer with fewer companies.

The Applicants do not quantify the amount of traffic that SBC will move off of existing backbones and onto AT&T's backbone, but Mr. Rice does indicate that doing so will result "in real savings."<sup>7</sup> SBC, with over 5 million broadband Internet access subscribers, is the second largest broadband Internet access provider in the nation. Taken together, these facts indicate that the shift of SBC's Internet traffic to the AT&T backbone will measurably increase AT&T's backbone market share and widen the spread in share between the merged company and the other backbone players (especially those from which SBC traffic is removed).

The effects described above on the prices that downstream providers like EarthLink pay for backbone transit may be amplified by another result of the merger that Applicants fail to address. That effect is the loss of passed-through volume discount savings that AT&T has enjoyed as one of the largest purchasers and resellers of special access transmission. In light of the fact that AT&T will as a result of the merger lose much of its incentive to peer and sell transit on competitive terms, the extent to which

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<sup>6</sup> Rice Decl. ¶16.

<sup>7</sup> *Id.*

AT&T's current participation in the market for special access services has disciplined pricing for those services must be explored. The Application addresses special access only in the context of such services offered by SBC; it says nothing whatsoever about AT&T as either a purchaser or a seller of such services.<sup>8</sup> As such, the Application is facially deficient with respect to this issue, an issue that is of concern to enterprise customers and retail information service providers alike.

Finally with respect to the backbone, as mentioned in passing above, the Application takes no account of the proposed merger of MCI with either Verizon or Qwest. Inasmuch as that proposed merger will result in an increase in backbone concentration that is approximately the same as the increase that would result from the SBC/AT&T transaction, any analysis of the reasonably foreseeable state of the market post-merger must address that parallel action. The Applicants' failure to do so renders their analysis facially inadequate.

Taken together, these potential merger-related reductions in backbone competition that the Applicants have neither acknowledged nor addressed are sufficiently material that the Applicants must more thoroughly and transparently analyze the backbone concentration effects before they can be found to have satisfied their burden of proof on this issue.

2. *The Applicants Have Failed To Support Their Product Market Definitions.*

Applicants have divided their analysis roughly into mass market services,<sup>9</sup> business services,<sup>10</sup> SBC's special access services,<sup>11</sup> and Internet services.<sup>12</sup> As discussed

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<sup>8</sup> See Description of the Transaction at pp. 102-105.

<sup>9</sup> *Id.* at p. 44.

<sup>10</sup> *Id.* at p. 67.

above, within the Internet services market, Applicants have provided an incomplete analysis of a hypothetical backbone market, and have asserted that there will be no merger-related effects in the last mile market because AT&T has withdrawn from that market. Based upon the Applicants' own description of the nature of the proposed merged entity and the network that it intends to operate, it is inappropriate to view the relevant product market as being as balkanized as Applicants have portrayed it.

The Applicants urge four principal public interest benefits from the merger: (1) renewed U.S. leadership in telecommunications, (2) increased national security, (3) increased research efforts, and (4) the creation of a unified IP network.<sup>13</sup> We focus here on the last of these four purported benefits and the relationship of that claimed benefit to the proper product market definition for Internet services.

In urging the technical benefits of merged networks, the Application states that:

SBC lacks the extensive backbone network necessary to efficiently interconnect all of its content sources and subscribers. AT&T, on the other hand, has the backbone capabilities but lacks broad local access facilities. *The combined assets will create a seamless, high quality and cost effective end-to-end IP network for next-generation applications.*<sup>14</sup>

The individual declarations explicate the concept of creating a new "end-to-end IP network" as one of the primary functions of the merger. Those declarations emphasize

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<sup>11</sup> *Id.* at p. 102.

<sup>12</sup> *Id.* at p. 105.

<sup>13</sup> *Id.* at pp. 13, 17, 21, 33. The first three suggested benefits border on the frivolous. The first -- U.S. leadership in telecommunications -- is so vague as to be meaningless. The second, national security, would appear to be better served by preserving competition. In any event, the Application indicates that both companies are large and successful suppliers of services to the government today. As to the research benefit, there is no explanation of why innovations developed by one firm that are inapplicable to its own network could not be implemented in the other company's network through contracts, licenses, or joint ventures.

<sup>14</sup> *Id.* at p.43 (emphasis added).

that the desired results will not arise merely by bringing complementary network assets under common control, but rather that those benefits require that the currently separate networks be functionally transformed so as to be vertically integrated into a qualitatively different single network. Thomas Horton, for example, explains that:

*In this regard, it is important to stress that the full potential of IP-based capabilities cannot be realized simply by transforming the backbone network, but also requires a comparable transformation of the local network. An “end-to-end” IP network offers the prospect of a whole new host of innovative services that simply cannot be offered using the legacy, circuit switched network. As Dr. Eslambolchi explains in greater detail, a fully unified IP network will allow the creation of a single, integrated system for ordering, provisioning, and maintaining voice, data and video services with interactive capabilities. The creation of a single, unified IP network will also allow for greater ability to share bandwidth, and hence enable better bandwidth-intensive services such as video conferencing, customer relationship management applications integrated with voice services, and unified voice and e-mail messaging. And a fully unified IP network will allow for the combined company to provide greater guaranteed quality service.<sup>15</sup>*

Dr. Eslambolchi similarly describes the creation of a new network, not merely the combination of two existing networks:

The transformation from existing to advanced networks that should be accelerated and enhanced as a result of the merger will put in place the necessary building blocks to provide public benefits associated with the next generation of advanced, IP-based broadband services. Consumers will more quickly realize the benefits of a unified, advanced telecommunications network capable of delivering the full range of voice, data, and video services to an ever-expanding array of personal and business devices. Once telecommunications service providers can surmount the difficulties created by the multitude of legacy software and hardware systems, the artificial divisions of applications and systems, and the limitations of traditional switched-based networks, they can provide consumers of all types with the ability to choose, provision, change, and maintain their services with an almost unimaginable degree of speed, efficiency and efficacy. The converged network will provide a highly efficient and cost effective platform for communication not only in North America, but also in Europe and Asia – providing increased global competitiveness for U.S.-based businesses.<sup>16</sup>

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<sup>15</sup> Horton Decl. ¶14 (emphasis added).

<sup>16</sup> Eslambolchi Decl. ¶18.

The Executive Summary of the Description of the Transaction reinforces the central importance of the network integration element to the Applicants' case:

The 1984 divestiture of the Bell System and the ensuing 20 years of regulation have segregated the telecommunications industry along artificial local and long distance faults. Companies on both side of the divide were long precluded from taking advantage of the enormous efficiencies associated with operating an end-to-end network. *But the broadband future of our country critically depends on the ability of companies to assemble these separate networks. The maximum potential of broadband can only be achieved where broadband capabilities are implemented at all levels of the network.*

That is why the merger of SBC and AT&T provides such an ideal opportunity at this juncture, when intermodal competitors (wireless and cable in particular) are challenging the traditional networks. The existence of separate local and long distance companies no longer benefits consumers. *But neither SBC nor AT&T standing alone has the assets and expertise necessary to assemble to a true nationwide end-to-end broadband network. Their union will allow beneficial vertical integration without diminishing vigorous horizontal competition.* The merger of these two legacy carriers is the most logical and natural outcome to ensure a strong and vibrant industry.<sup>17</sup>

One of two things is going on here. Either these descriptions of the creation of a new, seamless network from the disparate components of the current networks are pure hyperbole, and therefore the purported public interest benefits do not exist, or the Applicants truly are poised to create a network that is qualitatively different in terms of vertical integration than anything that has existed since the break-up of AT&T. Assuming that the latter is in fact the case, the Applicants' own description of the effects of the merger compels that the product market for competition and public interest analysis purposes must reflect the new product that Applicants propose to offer. The Applicants themselves candidly acknowledge this fact, stating that "it is by no means clear that the market definitions the Commission has traditionally applied in merger proceedings are still valid in this era of rapidly converging services. In an IP world,

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<sup>17</sup> Description of the Transaction at p. iii (emphasis added).

voice and data are both merely the transmission of bits over the same network.”<sup>18</sup>

EarthLink agrees with this assessment, and urges the Commission to analyze the proposed merger using a product market definition that reflects the fact that the merged company will, for the first time since the advent of the commercial, mass-market Internet, operate a network that is fully vertically integrated from the end user’s premises all the way to the termination facility that connects the user with his or her destination on the Internet.

Product markets in the recent past have included smaller components of the “network of networks” that comprises the Internet because those components have been operated by different groups of carriers. Inasmuch as the new company will operate the first mass-market end-to-end network under single ownership since the break-up of AT&T, the competition analysis used here must reflect that change in circumstances. The primary reason that the product market definition must shift is not merely the consolidated ownership of all parts of the network, although that is a factor. Instead, the most important reason for choosing a new product market is that, according to the Applicants, the way that the network functions will fundamentally change. In light of this qualitatively new telecommunications offering, EarthLink proposes that the Commission analyze the merger for Internet purposes using a product market of “end-to-end Internet connectivity.” That market would treat as a single product the consolidated transmission path necessary to carry information from the end user to its final destination. It would therefore encompass each of the separate markets that are today separately thought of as “last mile,” “special access,” and “backbone” services.

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<sup>18</sup> *Id.* at p. 5.

Within this proper market definition, the new company would stand alone, at least until and unless MCI merges with Verizon or Qwest. Even then, the merged company would have no competitor in SBC territory. For this reason, the Commission is quite correct to request additional information from the Applicants on a state-by-state level. No other company, including the cable companies,<sup>19</sup> has integrated all of the necessary network components into a single, seamless, end-to-end IP network as Applicants propose to do. Because the merged company will be the sole player at this qualitatively distinct level of network integration, it will have both the ability and the incentive to use its comprehensive control of the network to diminish the ability of other companies to compete in providing services over the Internet. Most specifically for EarthLink's purposes, the merged company will have the incentive and ability to affect the pricing and quality of transmission services so as to disadvantage independent ISPs like EarthLink in the downstream markets for Internet access and information services such as email, web hosting, and other applications that make up the core of EarthLink's business.<sup>20</sup>

The ability of the merged entity to discriminate against participants in downstream information services markets that depend upon access to transmission

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<sup>19</sup> Cable companies, with the exception of AOL Time Warner operating under an FTC/FCC-imposed merger condition, do not currently sell transmission services to ISPs in commercially meaningful quantities. Fewer than half of Time Warner's broadband Internet markets are in SBC territory, and the merger condition expires in the fall of 2006. No cable company is a significant provider of backbone services.

<sup>20</sup> In addition to this incentive and opportunity for direct discrimination against competitors in transmission-dependent downstream retail markets, the end-to-end nature of the new network would also exacerbate the peering concerns addressed above. Because no potential peer would have the ability to carry reciprocal traffic over as long a geographic distance as the merged company, the incentive of the merged company to peer on a settlement-free basis would be further eroded. The removal of an independent AT&T as the largest backbone player will have a negative effect as well. As a company that does not control substantial last-mile facilities, AT&T today has no incentive to discriminate in providing backbone transmission services. Post-merger, given SBC's dominant position with respect to last-mile facilities, the incentives for backbone discrimination will increase.

services would threaten diversity, innovation, and price competition in all of those downstream markets absent some condition requiring nondiscriminatory access to the Applicants' transmission network on reasonable terms and conditions. This ability to discriminate arises directly out of the merger, because it results from the creation of a new network that is -- according to the Applicants -- uniquely seamless throughout its geographic reach.

**B. The Public Interest Harm Presented By the Ability of The Applicants to Reduce Competition in the Downstream Internet Access and Information Services Markets Can Be Addressed By A Condition Requiring Nondiscriminatory Access to the New End-to-End Network.**

As noted above, the Applicants must provide substantial additional information before all of the impacts of the proposed merger can properly be analyzed. That said, the Application as it stands now demonstrates a very real threat that the merger will harm competition in downstream markets for Internet access and information services -- markets whose competitiveness requires the nondiscriminatory availability of transmission services. The solution to the problem of discrimination against downstream information service providers who would be placed by the merger in the position of being excluded from the end-to-end network to be created by the Applicants is both simple and familiar. As a condition to any approval of the merger, the Applicants should be required to sell to willing buyers -- including downstream retail competitors of the Applicants in the Internet access and information service markets -- transmission across the entire reach of the new network on reasonable and non-discriminatory terms and conditions. Sections 201 and 202 of the Communications Act require this today as a general matter, but pending Commission rulemakings indicate that the Commission is seriously considering

attempting to remove those existing obligations for broadband networks.<sup>21</sup> Especially if those proceedings have not reached their final conclusion before the Commission rules on the pending merger application, the merger-related public interest harms described above require a separate remedy that will function without regard to any broader actions that the Commission may take. Of course, whatever action the Commission takes with respect to the merger, it must explain what regulatory classification and what statutory and regulatory requirements apply to the affected services. Absent that regulatory baseline, it is impossible for either the Commission or the Department of Justice to evaluate the competitive impacts of the merger.

**C. Conclusion.**

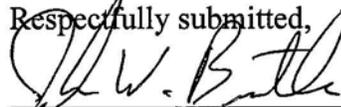
There are substantial gaps in the information provided by the Applicants. Until the information already requested by the Commission is furnished, along with any additional information that the Commission may request on the basis of the points raised above and in other pleadings, it is impossible for interested parties and the Commission to properly analyze the proposed merger. Accordingly, EarthLink respectfully requests that the Commission set a reasonable pleading schedule to accommodate additional pleadings based on new information provided by the Applicants. EarthLink believes that the earliest practicable due date for such pleadings is four weeks after the Applicants have responded to the Commission's outstanding data request.

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<sup>21</sup> See *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 (rel. Mar. 10, 2004); *Petition of SBC Communications Inc. for Forbearance*, WC Docket No. 04-29 (filed Feb. 5, 2004); *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-32 (rel. Feb. 15, 2002); *FCC v. Brand X Internet Services, et al.*, Nos. 04-277 and 04-281.

While the Commission and the parties await additional information, however, EarthLink urges the Commission to consider the proper definition of the product market with respect to broadband services affected by the merger, and further urges the Commission thereafter either to adopt an “end-to-end Internet connectivity” market definition or to reject the claimed public benefits resulting from the qualitative transformation of the existing separate networks into a seamless end-to-end IP network. In the event that the Commission decides to approve the merger, EarthLink also urges the Commission to adopt a nondiscriminatory access to transmission condition that will preserve the vibrant and competitive market that exists today in the retail Internet access and information services markets.

Respectfully submitted,



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April 25, 2005

CERTIFICATE OF SERVICE

I, John W. Butler, do hereby certify on this 25<sup>th</sup> day of April, 2005, that I have caused the foregoing Petition to Deny and Request for Adjustment to the Schedule of EarthLink, Inc., to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 05-65; 2) served via electronic mail on counsel of record for SBC Communications Inc. and AT&T Corp., as indicated below; and 3) served via electronic mail on the FCC's duplicating contractor, Best Copy and Printing, Inc.

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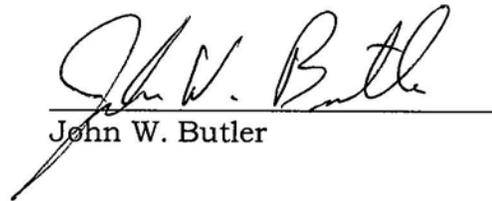
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