

Writer's Direct Dial  
(202) 463-2510

May 5, 2005

**EX PARTE**

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

Re: Ex Parte Presentation: WC Docket Nos. 05-65, 05-75

Dear Ms. Dortch:

On May 4, 2005, Dave Baker, Vice President of Law and Public Policy for EarthLink, and the undersigned of Sher & Blackwell LLP met with Ben Childers, Craig Stroup, Pam Megna, Marcus Maher, John Minkoff, Gail Cohen, Bill Dever, Paul Zimmerman, and Takeo Iijima of the Wireline Competition Bureau, and Joel Rabinowitz, Kent Nilsson, Ann Bushmiller, C. Anthony Bush, Neil Dellan, Jim Bird, and Karen Onyeije of the Office of General Counsel, and Chuck Needy and Jonathan Levy of the Office of Strategic Planning to preview the concerns that EarthLink intends to raise in a pleading to be filed on May 9, 2005, with respect to the proposed Verizon/MCI merger. This notice is being filed as well in WC Docket 05-65 because the discussions held included references to the parallel SBC/AT&T merger proceeding.

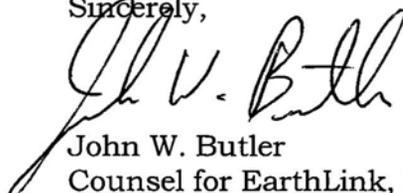
EarthLink representatives discussed concerns about the creation of two companies that would have Internet backbone transmission shares that would be significantly larger than those of the next largest backbone carrier, with the potential result that the merged companies would peer only with each other, or with fewer companies than they peer with today. The impact on EarthLink of such a result would be increased costs for "transit," or paid transmission, that it purchases today from a Tier 1 backbone provider that does not currently pay transit fees to AT&T or MCI. In addition EarthLink pointed out that the incentive to discriminate by backbone providers that do not participate significantly in local loop transmission markets (AT&T and MCI today) is qualitatively and substantially different than the incentive to discriminate by a vertically integrated company that already has substantial market power in the local loop market, which is the case for both SBC and Verizon. In this regard, EarthLink noted in response to staff questions that it was not the case that SBC and Verizon were already able to extract 100% of a monopoly rent

from companies such as EarthLink, but rather that the existence of common carrier regulation prevented those companies from doing so today. EarthLink further explained that, if these companies are allowed to vertically integrate without an enforceable condition that they would not discriminate against companies that are wholesale customers and retail competitors of the merged companies, the merged firms would have increased incentive and opportunity to discriminate against EarthLink by virtue of the merged firms' participation at all levels of the transmission services necessary to provide end-to-end Internet connectivity.

EarthLink also emphasized that it is critical that the Commission clearly state - both in its discussions with the Department of Justice and in the orders that it ultimately issues with respect to the applications -- what its regulatory assumptions are with respect to the services and companies involved. Specifically, in light of numerous open dockets and court proceedings related to the application of common carrier regulation to broadband Internet transmission services, the competitive landscape (and thus the appropriate FCC or DOJ action on the mergers) looks very different depending on whether or not the FCC believes that common carrier non-discrimination principles apply to broadband transmission service. EarthLink emphasized that any analysis that did not explicitly state and apply those regulatory assumptions (for both the current and future markets) would be legally unsustainable.

If you have any questions regarding this notice, please contact the undersigned at 202-463-2510.

Sincerely,



John W. Butler  
Counsel for EarthLink, Inc.

cc: Ben Childers, Wireline Competition Bureau  
Craig Stroup, Wireline Competition Bureau  
Pam Megna, Wireline Competition Bureau  
Marcus Maher, Wireline Competition Bureau  
John Minkoff, Wireline Competition Bureau  
Gail Cohen, Wireline Competition Bureau  
Bill Dever, Wireline Competition Bureau  
Paul Zimmerman, Wireline Competition Bureau  
Takeo Iijima, Wireline Competition Bureau  
Joel Rabinowitz, Office of the General Counsel  
Kent Nilsson, Office of the General Counsel  
Ann Bushmiller, Office of the General Counsel  
C. Anthony Bush, Office of the General Counsel  
Neil Dellan, Office of the General Counsel  
Jim Bird, Office of the General Counsel  
Karen Onyeije, Office of the General Counsel  
Chuck Needy, Office of Strategic Planning  
Jonathan Levy, Office of Strategic Planning