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May 9, 2005

**VIA ECFS**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
The Portals  
TW-A325  
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Washington, D.C. 20554

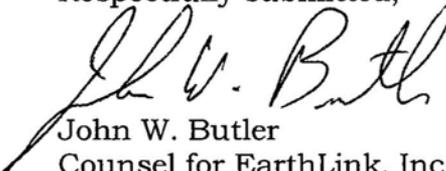
Re: In the Matter of Verizon Communications Inc. and MCI, Inc.  
Applications for Approval of Transfer of Control, WC Docket  
No. 05-75; and In the Matter of SBC Communications Inc.  
and AT&T Corp. Application for Approval of Transfer of  
Control, WC Docket No. 05-65

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. Because the issues addressed in this filing impact the SBC/AT&T merger as well, we are filing the document in both proceedings.

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

Verizon Communications, Inc. and  
MCI, Inc. Applications for  
Approval of Transfer of Control

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WC Docket No. 05-75

**PETITION TO DENY OF EARTHLINK, INC.  
AND REQUEST FOR ADJUSTMENT TO THE SCHEDULE**

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May 9, 2005

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

In the Matter of	)	
	)	
Verizon Communications, Inc. and	)	WC Docket No. 05-75
MCI, Inc. 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 24, 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 what appears to be an up-coming Commission 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 that will be sought by the Commission. 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. Executive Summary**

Because the Application does not provide sufficient information to allow the Commission to determine that the proposed transaction would provide any benefits to the public (as opposed to one or both of the merging companies), much less information sufficient to show that any potential public benefits outweigh the public harm associated with the removal of a major competitor from the telecommunications services marketplace, the Application as it stands now must be denied.

There are a number of particular types of service (special access, long distance telephony, broadband last-mile loops, etc.) that would be impacted if the merger were to be consummated. Inasmuch as the comments and petitions to deny filed to date in the companion SBC/AT&T merger proceeding indicate that other parties may be expected to focus in depth on one or more of those points, some of which are also of concern to EarthLink, EarthLink here focuses on those points that are most uniquely of interest to independent ISPs.

Most fundamentally, independent ISPs require the ability to purchase transmission services, including broadband transmission services, in order to provide connectivity from the end user's premises to any destination on the Internet that the end user seeks to reach. The proposed merger would create a company that is vertically integrated to an extent not seen since the break-up of the old AT&T, and to an extent never seen since the advent of the Internet as a public transmission network. The proposed company post-merger would be both a wholesale provider of transmission services at every level of the transmission network (local loop or "last mile," special

access or “middle mile,” and long-haul or “backbone”) and also a retail competitor in the market for Internet access service. As such, the merged company would possess an incentive and ability to discriminate against independent ISPs beyond anything that the Commission has seen before. This level of vertical integration poses important questions with respect to the related issues of proper product market definition and competitive effects post-merger.

The Application, while voluminous, consists primarily of unremarkable and general factual statements paired with conclusory pronouncements that there will be no harm to competition. Of particular interest to EarthLink, the analysis of the impact of the proposed transaction on the Internet backbone market is exceedingly cursory and incomplete. As is discussed in more detail below, that analysis includes no discussion of the relevant geographic market(s), provides a fatally incomplete market share analysis, and fails even to acknowledge, let alone analyze, how Verizon’s announced intention to convert substantial amounts of circuit-switched traffic to packet-switched IP traffic will affect the backbone market share of the merged company. Moreover, to the extent that the Application does provide any analysis of the effect of the merger on backbone traffic, it assumes without explanation that the analysis is in no way impacted by the vertical integration that will result from the merger.

Finally, EarthLink urges the Commission to be clear -- both in its discussions with the Department of Justice (“DOJ”) and in whatever final order it issues addressing this application and the SBC/AT&T application -- with respect to the regulatory lens through which the Commission views these related transactions. Specifically, the extent to which the mergers may be permissible under traditional antitrust analysis is directly affected by the extent to which the transmission services of the merged companies will be governed

by the obligations in sections 201 and 202 of the Communications Act, which require that telecommunications carriers provide service upon request on reasonable and nondiscriminatory terms and conditions. The Commission has open numerous dockets addressing the proper statutory classification and appropriate level of regulation of broadband transmission services, so the issue is by no means academic. Moreover, while those proceedings undeniably have application outside of these mergers, they nevertheless have a direct impact on the Commission's and the DOJ's analysis of the competitive impact of *these* transactions, and the issue of what regulatory regime applies must therefore be addressed here.

**B. Points and Authorities In Support of Denial.**

1. The Application's Analysis of the Backbone Market 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. 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. Verizon is rich in last mile assets, while MCI 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. The public interest benefits that Applicants claim from the transaction arise almost exclusively from the concept that a single, integrated network is greater than the sum of its parts; in other words, vertical integration creates a network transmission product that is qualitatively different from the transmission that can be obtained by combining inputs from separate providers.<sup>1</sup> If that is the case, then Applicants are clearly incorrect when they claim that “[t]he combining companies are not ‘among a small number of . . . most significant market participants. . .’”<sup>2</sup> To the contrary, if the Applicants’ view of the primacy of integrated networks is adopted for the purposes of the Commission’s analysis, then the merged firm would, in the event that the SBC/AT&T merger were consummated, be one member in a club of two.

We begin with a discussion of the shortcomings in the Application’s backbone analysis and then relate those shortcomings to broader concerns from the vertical integration that would result from the merger.

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<sup>1</sup> See Application at pp. 5-6.

<sup>2</sup> *Id.* at 18.

a. *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 Michael Kende. 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.

Dr. Kende cites three types of publicly available data that can be used to measure market shares of backbone providers: revenue, traffic, and connectivity.<sup>3</sup> Dr. Kende essentially discounts the available connectivity data as being too selective to be complete or representative. The traffic data that he includes identifies by name only the market share of AT&T, so little can be gleaned from that information except that the top four companies have substantially greater shares than any of the smaller companies.

With respect to the revenue data, the only analysis that Dr. Kende offers is the statement that the combined MCI and Verizon shares are less than the share of AT&T.<sup>4</sup> What the declaration does not say is that, on a revenue basis, the combined Verizon/MCI shares would be greater than any other company except AT&T (whether alone or combined with SBC). Thus, what the data show is that, if both mergers are completed, the two largest backbone shares will be held by the only two fully vertically integrated broadband telecommunications companies. Other than the Sprint share, which would be only a little over a third of the SBC/AT&T share and just over half of the Verizon/MCI share, the

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<sup>3</sup> Kende Declaration at ¶¶ 4-6.

<sup>4</sup> *Id.* at ¶ 4.

share of the next largest remaining market participant is 5.2%, which is just over a third of the share of a combined Verizon/MCI.

The proportions of the market shares are more important than the absolute market shares because of the criteria that backbone transport providers use to determine the companies with which they will “peer,” or exchange traffic on a settlement-free basis. Because Internet connectivity is not valued by customers unless customers can reach all points on the Internet, the Internet – and backbone transmission – is by its nature a collaborative undertaking. Thus, backbone providers do not simply carry what traffic they might be able to obtain without reference to their competitors. Instead, in order for the enterprise to work, all providers must trade traffic under some arrangement. For the so-called “Tier 1” carriers, that mechanism is peering.

Dr. Kende discusses some of the criteria by which providers determine with whom to peer.<sup>5</sup> Nowhere, however, does he mention what may be the most important issue for this proceeding: maximum traffic imbalance. This factor is listed for each company included in Annex D to Dr. Kende’s declaration. That annex summarizes elements of publicly available peering policies. Of the potential Tier 1 companies listed, the greatest traffic imbalance allowed is 2.5 to 1, by Broadwing. MCI’s stated maximum imbalance is 1.8 to 1. If revenue, the only data that Applicants provide that is identified by company name, is even a roughly accurate proxy for traffic, the merged Verizon/MCI would peer only with a merged or unmerged AT&T and with Sprint. If that situation indeed were to occur – and it is the only scenario that is supported by the information submitted by the Applicants – then between three and five companies that peer with MCI

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<sup>5</sup> See *id.* at ¶¶ 10-11.

today would not have that opportunity post-merger. Those companies, which include Level(3), from which EarthLink buys transmission on a “transit” basis, would thereafter themselves have to pay transit to MCI. That would raise their costs of operation, and would in turn raise the rates that they would charge to their customers, EarthLink among them. The result of that sequence of events would be either to make transit customers such as EarthLink less able to compete in the retail Internet access market in which the merged entity would be a direct competitor or to drive purchasers such as EarthLink to purchase directly from the merged company. To the extent that the latter occurs, the disparity between the small and the large backbone providers would be further exacerbated, creating a self-reinforcing tendency toward duopoly.

More directly, EarthLink currently peers with both Verizon and SBC. If either or both of the mergers go through, EarthLink expects that it is entirely likely that the merged entities will cease to peer with EarthLink, thus increasing its costs with respect to the traffic that it currently exchanges with these Applicants on a settlement-free basis.

Another effect that the Application fails to mention is the extent to which Verizon, which originates a substantial amount of Internet-bound traffic through its residential and business DSL-based Internet access services, will concentrate its own traffic largely or entirely on the MCI backbone. EarthLink urges the Commission to request that the Applicants place their plans in this regard on the record, along with their projections for increases in Internet-bound traffic associated with planned roll-outs of voice-over-IP and video-over-IP services.

In sum, the Application on its face fails to properly address the potential impacts of the backbone market. As is discussed further below, those unanalyzed effects may have a substantial impact on the availability of reasonably priced wholesale end-to-end

connectivity for Internet-bound traffic, thus reducing competition in the retail market for Internet access services.

*b. The Merger Effects in the Backbone Market Must be Viewed in Light of the Entire Network Necessary for Internet Connectivity.*

In considering the inadequate backbone analysis in the Application, it is important to recognize that the backbone, like the local loops that serve individual customers' premises, is simply one part of a continuous connectivity that must exist if the Internet is to work. Accordingly, anticompetitive effects at any level of the network are cumulative with anticompetitive effects in other parts of the network. Even an effect that is small taken in isolation can be significant when it is combined with other reinforcing effects. Viewed in this light, it appears that it is inaccurate to analyze the merger impacts in terms of discrete product markets that consist of individual parts of the network (e.g., "last mile," "special access," etc.). Although there may be certain types of customers for whom only one such network element is important, Internet access providers require end-to-end connections. For companies like EarthLink, for one part of the network to be unavailable or constricted can mean that the whole network is unavailable. Inasmuch as end-to-end connectivity is the minimum service that is of use to an independent Internet access service provider, that end-to-end connectivity defines the relevant product market.

In this context EarthLink notes that, for all of the Applicants' statements regarding the lack of substantial overlap in their networks, it is not the fact that today Verizon is today able to extract 100% of the "monopoly rent" associated with its dominant position in the wholesale broadband last mile market.<sup>6</sup> The existence of the

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<sup>6</sup> The Applicants refer to broadband competition from cable (*see* Application at p. 36). However, with the exception of cable broadband transmission that AOL Time Warner sells to EarthLink under an FTC-imposed merger condition, cable companies have for years consistently refused to provide any wholesale broadband transmission to unaffiliated ISPs.

common carrier obligation under sections 201 and 202 of the Communications Act to provide service on nondiscriminatory terms and conditions, although only reluctantly enforced by the Commission of late, has acted as a check on Verizon's DSL pricing. Competition from Covad has also exerted some discipline. That said, it is nonetheless no small task to obtain nondiscriminatory access to transmission from a supplier that is both a retail competitor and that also holds market power in the market for wholesale transmission. Given the difficulty of that circumstance, any further aggregation of power over the end-to-end network would not need to be large to have a significant effect. Accordingly, even though the merger arguably would not cause a significant diminution in wholesale last mile broadband competition, changes in the backbone segment could affect the overall ability of providers such as EarthLink, which require end-to-end connectivity to deliver their services, to compete in the retail Internet access service market. EarthLink therefore urges the Commission to review carefully the several possible impacts of the merger on backbone competition. Certainly on the record as it currently exists, the only conclusion that can reasonably be drawn is that the merger would reduce competition both in that market and in the downstream retail market for Internet access services.

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

2. The Commission Must Explicitly State What Regulatory Regime Applies to the Services Offered by the Applicants.

A great deal of the Application is devoted to discussions of the new, advanced and innovative broadband services the merged company would bring to market. However, it is precisely with respect to such services that the Commission has created a great deal of confusion concerning how such services will be classified and regulated under the Communications Act.<sup>7</sup> That confusion must be resolved before the Commission may act on these mergers. The reason is simple. If the transmission services that the Applicants sell to the public are “telecommunications services” as defined by the Communications Act, then those services are subject to, *inter alia*, the requirements of sections 201 and 202 of the Communications Act, which require that such services be sold upon request on reasonable and nondiscriminatory terms and conditions. Such protections, assuming a Commission willing to enforce them, would to some degree ameliorate the specific concerns of companies like EarthLink, which are both purchasers of wholesale services from and direct retail competitors with the proposed new entity.<sup>8</sup>

If, on the other hand, the Commission were to decide that the transmission services offered by the merged entity were for some as-yet unstated reason not “telecommunications services” subject to title II of the Act, then the serious anticompetitive impacts of creating two vertically integrated super-carriers possessing the

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<sup>7</sup> See *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 (rel. Mar. 10, 2004); *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, (rel. Feb. 15, 2002); *FCC v. Brand X Internet Service* and *NCTA v. Brand X Internet Service*, Docket Nos. 04-277 and 04-281 (Argued March 29, 2005).

<sup>8</sup> It would appear much less likely that a nondiscrimination requirement alone would ameliorate the direct loss of retail competition that, for existence, large commercial end users would face if this merger and the SBC/AT&T merger were approved.

only end-to-end broadband networks in the nation would have to be avoided either by outright rejection of the mergers or by substantial structural and behavioral conditions.

As important as a clear statement of the Commission's working regulatory assumptions is for the accuracy and sustainability of the Commission's own treatment of the merger, that clear statement is equally critical to the ability of the Department of Justice to conduct its proper review. Particularly in light of the fact that the DOJ routinely considers the regulatory regime applicable to an industry in its merger analysis, and given the substantially different competitive landscapes that would exist with and without common carrier regulation, it is impossible for either agency to go forward until and unless the Commission clarifies what regulatory scheme applies today, and what regulatory regime it intends to apply for the foreseeable future post merger.

**C. 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. As suggested above, that condition can come either from a clear and industry-wide statement from the Commission regarding the transmission services offered to the public by the Applicants, or, in the absence of such a general statement, as a merger-specific condition that applies until Applicants can affirmatively demonstrate that it is no longer necessary. If in fact the merger is pro-competitive and the Applicants intend to participate vigorously and fairly in wholesale markets post-merger,<sup>9</sup> then the Applicants should have no objection to such a condition, because their behavior will be such they will never feel the condition as anything except the natural result of the conduct of their business.

**D. Conclusion.**

There are substantial gaps in the information provided by the Applicants. Until the information to be 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 completely to the Commission's forthcoming data request.

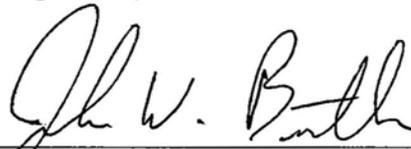
While the Commission and the parties await additional information, however, EarthLink urges the Commission to consider the merger's overall effect on competition

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<sup>9</sup> See Application at p. 14 (claiming merger benefits for wholesale customers).

in the market for end-to-end broadband transmission services. EarthLink also respectfully requests that the Commission clarify its working assumption regarding the applicable regulatory scheme so that further comments and suggestions for remedies may be tailored to fit with that regulatory baseline. On the present record EarthLink urges the Commission to deny approval of the merger; however, in the event that the Commission nonetheless 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. Such a condition, in order to be effective, must include a prompt and transparent enforcement mechanism.

Respectfully submitted,



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May 9, 2005

CERTIFICATE OF SERVICE

I, John W. Butler, do hereby certify on this 9<sup>th</sup> day of May, 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. 05-75; 2) served via electronic mail on counsel of record for Verizon Communications Inc., MCI, Inc., 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. ([fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)) and the following:

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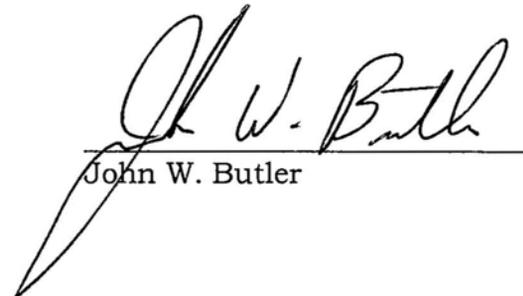
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