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**Via Hand Delivery**

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 Verizon Communications, Inc. et al.

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

In the Matter of

WC Docket No. 05-75

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

IN REPLY TO THE ANSWERS OF EARTHLINK, INC.

RESPONSE

On May 9, 2005, EarthLink, Inc. (EarthLink) stated

In its Petition to Deny, filed

proposed merger is its effect on the availability of

that its primary concern with the

net-based service providers require in order to serve

transmission services for all Internet

EarthLink argued that the proposed merger of Verizon and

their customers.<sup>1</sup> Specifically,

ical integration that far surpasses anything that has been

MCI represents a level of verti

seen since the advent of the commercial Internet, and last experienced before the break-

up of AT&T. Because MCI is rich in Internet backbone assets and Verizon is rich in

last-mile assets, the combined company post-merger would be both a wholesale provider

~~Pursuant to the Commission's request, the Applicants have submitted new~~

~~information that they have not previously submitted in their filings. In light of this new information,~~

Applicants have raised new arguments based on information that was not available at the

time of EarthLink's initial filing, we take this opportunity to respond to these

arguments. Although the Applicants have attempted to address concerns over

proposed merger's horizontal effect in the Internet backbone market, given

level of vertical integration involved in this merger,

incomplete in three vital areas.

First, using the Applicants' own description

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For those reasons addressed in greater detail below, the Agency will

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Applicants own description of the effects of the merger supports this assertion. The current product markets analyzed by the Applicants do not reflect commercial reality and must be rejected.

Second, unlike the Commission's review of past mergers in which the competitive concern was focused entirely on horizontal concentration of Internet backbone market power, this transaction also presents vertical integration issues that threaten a

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Internet users in its territory.<sup>8</sup> Once Verizon adds MCI's very large Internet backbone market share to its own substantial last-mile facilities, the combined company will have both the ability and the incentive to use its comprehensive control over the network to diminish the ability of other companies to compete in the retail Internet access market

and in other product markets that require Internet-based transmission. Indeed, within Verizon territory the combined company would be the *only* provider of end-to-end Internet connectivity." The use of the "end-to-end Internet connectivity" product market allows the Commission to address this unique competitive concern in its analysis.

While it is difficult to identify the user of the "end-to-end Internet

connectivity" product market, whatever product market definitions are used to assess the

properly identified and analyzed, and the competitive impact of this merger, they must be properly identified and analyzed. As the Eighth Circuit held in *FTC v. Freeman Hospital*, "without a well-determined relevant market, an examination of a transaction's competitive effects is without context or meaning." A relevant market consists of two separate components: a product market and a geographic market.<sup>9</sup> The Applicants' continued failure to identify proper product markets renders their Application facially inadequate.

<sup>8</sup> See Leichtman Research Group, Another Record Quarter For High-Speed Internet, available at <http://www.leichtmanresearch.com/press/351376/verizon.html> (Feb. 17, 2005) (reporting Verizon had 3,944,000 DSL subscribers as of the end of Q1 2005).

<sup>9</sup> *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1993). The Commission has also held that "in evaluating the potential competitive effects of a transaction, it is necessary to first define the product and geographic markets." See also *In the Matter of General Motors and Hughes Electronics Corp.*, 19 F.C.C. Rcd. 473, 499, at ¶ 50 (2004).

**II. The Applicants' Arguments Regarding the Merged Company's Incentive and Ability to Discriminate Are Without Merit.**

In its Petition to Deny, EarthLink raised two specific concerns regarding the post-

~~merger potential for the combined company to discriminate against Internet backbone~~

providers as well as independent ISPs. First, based on projected traffic imbalance,

EarthLink expressed concern that the combined firm would choose to peer only with the

~~merged SBC/AT&T entity and possibly Sprint, forcing other current settlement-free~~

peers, like Level 3, to pay for transit. Because EarthLink currently buys transmission on

a transit basis from Level 3, one could expect Level 3's costs to increase, which in turn

~~would raise EarthLink's costs of operation.<sup>10</sup> More directly, EarthLink currently peers~~

with both SBC and Verizon. Thus, EarthLink's second concern is that, if the proposed

mergers go through, it is entirely likely that the merged entities will cease to peer with

~~EarthLink, thus increasing EarthLink's costs. With respect to the claim that it currently~~

~~exchanges with these providers on a settlement-free basis.<sup>11</sup> The result of this increase~~

will ultimately mean higher costs for EarthLink customers. As discussed above, this

expectation is more than reasonable considering the incentive and ability that these

merged firms will have to discriminate against independent ISPs in the end user market

for Internet-based services.

~~Applicants offer a long list of superficial arguments~~

~~In their Joint Opposition, the A~~

~~competitive concerns regarding Internet-related~~

~~attempting to address these and other~~

~~elements of EarthLink's concerns stated above. To the extent~~

~~service. We focus on the five most~~

~~Internet backbone providers: Verizon, Qwest, and~~

~~the Applicants suggest that the~~

<sup>10</sup> EarthLink Pet. To Deny at 7-8.

<sup>11</sup> *Id.* at 8.

the combined market share of Verizon/MCI and SBC/AT&T would be too small for any

*second*, the Applicants argue that degradation of service is

real competitive concern.<sup>12</sup> S

~~backbone that focuses on connecting in a similar manner backbone~~

~~to a possibility because a~~

ability to suffer.<sup>13</sup> *Third*, the Applicants assert that if the

causes both backbones' qua

~~to raise transit prices or degrade service after the merger, and~~

~~combined company wer~~

mer cable or an alternative technology.<sup>14</sup> *Fourth*, the Applicants

users who switch to eth

panies have both the incentive and ability to counteract any

suggest that cable com

discrimination by Verizon/MCI, or any "mega-peer" strategy by Verizon/MCI and

NO/AT&T<sup>15</sup>

~~the Applicants argue that the combined~~

~~discrimination by Verizon/MCI, or any "mega-peer" strategy by Verizon/MCI and~~



**11. The Harm Caused By Degradation of Service Would Be Much Greater to the Merged Firm Than to Competing Networks.**

In Dennis Carlton's reply declaration, he suggests that there is no concern that the merged company will discriminate against other Internet backbone providers because "a backbone which degrades or refuses to connect with another, smaller backbone causes

our backbones. Many of these are small, relative to the Internet user base.<sup>20</sup> In other words,

Carlton suggests that, should the Applicants degrade service vis-a-vis another backbone,

the hurt as much as the

of backbones are. In the merger, the merged company would

change traffic because such

networks with which the merged company refused to exchange

the Applicants' own customers

degradation would leave "black holes" in the Internet for

other carriers' networks.

who are seeking to reach points on the Internet through a

very fundamental fact about the vertical integration

This defense ignores a ve

involved in this proceeding. As discussed above, MCI (like AT&T) controls a relatively

small percentage of retail end user customers compared to Verizon. As such, MCI today,

has no real incentive or ability to discriminate against other IBPs. Verizon, however,

controls the vast majority of end user analog lines in Verizon territory and a substantial

number of end user broadband lines throughout Verizon territory.<sup>21</sup> Verizon's control of

end users – coupled with its acquisition of MCI's substantial Internet backbone assets –

means that the merged company would have the power to demand that the other

backbone providers submit to such terms as the merged entity may require and/or that the

merged company would deny interconnection altogether to another IBP. This is so

<sup>20</sup> Carlton Reply Dec. at ¶ 87.

<sup>21</sup> See Response of Verizon to the Commission's May 5, 2005 Initial Information and Document Request at Table & A.1 (Consumer Lines Connected to Verizon's Internet Backbone) (hereinafter "Verizon Response to the REC").

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because the harm caused in terms of “black holes,” or users that cannot be reached as a result of transmission degradation, will be *relatively* much smaller for the merged companies than for those using competing networks.

VoIP provides a good example of why this is so. VoIP, which requires a broadband Internet connection, can be used to call anyone with a standard telephone line or a VoIP-enabled broadband connection. Because Verizon controls in excess of 80% of the telephone lines in its territory,<sup>22</sup> (representing the vast majority of voice telephony customers), a merged Verizon/MCI has the ability to threaten each IBP that carries VoIP traffic with disconnection or degradation if that company does not pay to exchange traffic with the Verizon/MCI network. That the threat is credible is demonstrated by playing out a potential disconnection scenario based on current participants in the VoIP market.

According to Verizon’s response to the Commission’s request for additional information, Cablevision provides VoIP service “exclusively within Verizon’s region and currently serves more than 364,000 VoIP subscribers.”<sup>23</sup> Assume that Cablevision uses IBP “Z.” As of June 2004, Verizon had 46 million voice customers.<sup>24</sup> If Verizon/MCI disconnected “Z,” then Verizon/MCI’s voice customers would not be able to talk to Cablevision’s 364,000 voice customers. Looking at the other end of the equation, Cablevision’s customers would be denied access to 46 million Verizon customers.

Certainly, Verizon/MCI customers can be inconvenienced, but the suggestion that Verizon/MCI suffers *as much* harm as Cablevision is simply implausible. Moreover, in

<sup>22</sup> See Selected Form 477 Data as of June 30, 2004, Total Lines and Channels Provided to End Users (rel. Jan. 18, 2005) (hereinafter “477 Data”).

<sup>23</sup> Verizon Opp. at 111.

<sup>24</sup> See 477 Data, Total Lines and Channels Provided to End Users.



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It is no answer to the NetIP scenario discussed above to argue that the merged company would not threaten or implement degradation of traffic received from other Internet backbones out of a concern that its Internet access service would be disproportionately harmed. Although it is true on a nationwide basis that cable has something over 50% of the broadband Internet access market (with DSL holding the vast majority of the remaining broadband subscribers), the relative number of *broadband* customers served by the merged company is not the critical fact for purposes of evaluating the merged company's ability and incentive to degrade backbone transmission service after the merger. The reason that broadband-to-broadband is not the proper comparison is that the Internet does not function on the basis that broadband customers can only communicate with other broadband customers. Instead, all Internet users can communicate with virtually all other Internet users. The distinction between broadband and narrowband may determine the speed with which users can exchange large amounts of data, but the distinction has no bearing on how many people a given user can reach over the Internet.

Unlike cable companies, which essentially have only one method of transmission to deliver Internet access services to their customers, the BOCs have multiple methods of transmission including dial-up Internet access, and the vast majority of local loop

facilities used by dial-up Internet customers are owned by the BOCs. Both Verizon and SBC, for example, have over 45 million end user lines,<sup>26</sup> meaning that each of those two companies by itself has the capacity to provide Internet connectivity to more consumers than all of the cable companies combined currently serve. Nor is it a question of

<sup>26</sup> See 477 Data, Total Lines and Channels Provided to End Users and Total Lines to US Affiliates as of June 30, 2004. (The FCC reports that Verizon had 47,062,622 total lines and SBC has 45,630,173 total lines as of June 30, 2004).

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theoretical capacity. Today, the number of Internet users served by a combination of BOC-provisioned DSL and BOC-provisioned dial-up facilities substantially exceeds the number of cable modem service subscribers.<sup>27</sup>

Applying these facts to an Internet access scenario parallel to the VoIP scenario described above, if Verizon/MCI disconnected IBP "Z" (or all IBPs except SBC/AT&T), then both Verizon/MCI and Cablevision would likely suffer some amount of harm to their Internet access services. However, the harm to Cablevision would be more acute than the harm to the merged company. This is so because, while Cablevision's customers would not be able to reach any Verizon/MCI broadband or dial-up Internet subscriber, Verizon/MCI's customers would still be able to communicate with other Verizon/MCI-provisioned end users and with SBC/AT&T-provisioned end users (the latter because the roughly equal relative pain associated with degradation of traffic from the SBC/AT&T backbone would presumably deter degradation as between the merged companies).

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to suggest that the merged company would avoid threatening (in order to charge transit

where today it peers) or actually taking such action as long as it was profitable in the long

term, when one considers that this sort of anti-competitive action with respect to

backbone traffic would protect the merged company from competition with respect to

both Internet access services and voice services, the burden is on the Applicants to

show the possibility for significant economic harm, not practices about future

behavior. Of the latter there are many in the records of the former that do not

any argument that post-merger degradation of service would not occur

these reasons, any

substantial relative harm between the merged company and smaller ISPs

because of unrea

d.

must be rejecte

one were to assume that SBC/AT&T and or Verizon/MCI would not take

Even if

aggressive approach of causing serious short-term disruption of the Internet in

this sort of a

cause long term market structure, there is nonetheless a great deal of anti-

competitive

behavior in which Applicants could potentially engage short of such a bold

competitive

Such behavior includes, but is not limited to, delaying the transmission of Internet

move. S

and/or degrading the service quality of VoIP service.<sup>28</sup> Considering how much

truffin

would result to a competitor's business, as well as how little the Commission would

harm

able to prevent or discipline this type of behavior, these forms of anti-competitive

be ab

act arguably are as dangerous as the aggressive approach described above.

condu

Commission should not ignore recent history when considering whether one or both of the merged companies would engage in any of the above forms of anti-competitive conduct. The cable companies' treatment of their own affiliated ISPs a few years ago resulted in the bankruptcy and liquidation of Excite and High Speed Access Corp, nearly turning off Internet access for millions of customers. The track record in this regard argues strongly against any expectation that either of the companies would refrain from engaging in short-term anticompetitive conduct in order to

<sup>28</sup> The cable companies' treatment of their own affiliated ISPs a few years ago resulted in the bankruptcy and liquidation of Excite and High Speed Access Corp, nearly turning off Internet access for millions of customers. The track record in this regard argues strongly against any expectation that either of the cable companies' treatment of their own affiliated ISPs a few years ago resulted in the bankruptcy and liquidation of Excite and High Speed Access Corp, nearly turning off Internet access for millions of customers. The track record in this regard argues strongly against any expectation that either of the merged companies y

**C. There is No Evidence on the Record that End Users in Verizon Territory Have Competitive Choices of Broadband Providers.**

Throughout their Joint Opposition, the Applicants assert that one of the main reasons why the threat of raised transit prices or targeted degradation is not a concern is that such discrimination against Internet-based service or content providers would result in a loss of the combined firm's own broadband customers to a competing platform.<sup>29</sup>

Specifically, the Applicants argue that because cable modem service is the market leader for broadband services,<sup>30</sup> and new technologies like wireless and satellite offer even more alternatives,<sup>31</sup> any form of content or application discrimination would drive end users to

one of several alternative broadband providers. In addition to the explanation in the section above as to why discrimination is not plausible and likely, the Applicants have provided absolutely no evidence regarding the availability of competitive choices in

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national level has no relevance whatsoever to whether consumers in Verizon territory

have these choices. The state of California, one in which Verizon provides service, offers

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switch to cable modem service if the merged company provides inferior service or

~~prevents DSL customers from using the ISP of their choice. With respect to DSL customers,~~

~~at no cost to the merged company, the merged company will not discriminate against independent ISPs in its provision of broadband transmission services.~~

bleeding. have refused to sell cable broadband transmission to independent ISPs.

Professor Schwartz's second declaration in the SBC/AT&T proceeding.<sup>40</sup> In Dr.

Swartz's second declaration, he states that because cable operators are the

backbone purchasers and would collectively serve a considerably larger share of

Internet end-user base than would a combined SBC/AT&T, they have both the ab

the incentive to maintain competition among backbones.<sup>41</sup> The theory behind thi

argument is that, should the merged firm seek to de-peer or raise prices for bac

services, any cable company could shift its Internet-bound traffic to another lar

operator with a larger base, complete with its own edge companies.<sup>42</sup>

stated in response to the Applicants in the SBC/AT&T proceeding.<sup>42</sup> There

problems with this argument.

First, as is discussed in detail in section

controls more Internet end-user connections

have more broadband subscribers than

control more total end user connections th

Second, Dr. Schwartz's argume

II.B. above, it is simply not true that cable

than the BOCs. Cable does in the aggregate

are DSL subscribers, but Verizon and Sbc

can do all of the cable companies combined

ent assumes that it is economically practicable for

iated

having other competitors not do the same.<sup>43</sup> Furthermore, if cable companies initiate

some effective strategies to reduce the number of cable companies in the market.

**E. Verizon’s Endorsement of the “Net Freedoms” Principles Does Not Address the Discrimination Concerns Raised by EarthLink and Others.**

Finally, in response to several opponents’ arguments that the merger will result in discrimination against unaffiliated ISPs, the Applicants argue that they will continue to have “strong business incentives” to provide transmission to unaffiliated providers.<sup>44</sup> In support of this argument, the Applicants highlight Verizon’s public endorsement of former Chairman Powell’s “Net Freedoms” principles as well as the High Speed Broadband Coalition’s connectivity principles.<sup>45</sup> These principles, according to the Applicants, recognize that “consumers generally should have the freedom to access content of their choice, run their applications of choice, attach devices of their choice to the connection in their homes, and receive meaningful information regarding service plans.”<sup>46</sup> There are several reasons why the Applicants’ reliance on this argument is without merit.

First, Verizon’s endorsement of the “Net Freedoms” principles is simply a red herring meant to distract the Commission from the real issue. As they are described above, the “Net Freedoms” principles address the treatment of content once it is already being transmitted over the network. *They say absolutely nothing about whether an*

Further, they say nothing about what terms and conditions would apply to such access.

As EarthLink has stated throughout this proceeding, its primary concern with the proposed merger is its effect on the availability of transmission services that it and other

<sup>44</sup> Joint Opp. at 84.

<sup>45</sup> *Id.* at 85.

<sup>46</sup> *Id.*

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Internet-based service providers require in order to serve their customers. Verizon's

eliorates this endorsement of principles relating to the treatment of content in no way and concern.

expressions for Second, the "Net Neutrality" principles are not more than a set of

principles" to ideas. As the Applicants themselves assert, they are merely "guiding pr

uch, these principles which "all industry participants should voluntarily submit." As su

statutory right under have no legal force. They do not address the question of who has a

ve access to the Communications Act or a merger condition to request and receive

Moreover, there are no transmission services on reasonable and nondiscriminatory terms. A

agenda that Verizon has enforcement mechanisms for these principles. Even assuming argo

company from endorsed these principles in the past, what prevents the merged

the consequences be? Of course, the answer is that there are no mechanisms in place to

enforce these principles. What w

... should have no objection to a merger condition requiring just that. In their

Joint Opposition, however, the Applicants ask the Commission to reject “network

neutrality” conditions to the merger, suggesting that such “heavy-handed regulations” are

unnecessary.<sup>49</sup> A requirement that would ensure reasonableness and nondiscrimination

and not be “heavy-handed,” but in fact would represent no more than what is required

under sections 201 and 202 of the Communications Act. For all these reasons, Verizon’s

endorsement of the “Net-Neutrality” principles amounts to no more than unsupported

claims. The Applicants and the Commission must therefore reject their arguments.

**III. The Applicants Have Not Addressed the Regulatory Regime Applicable to the Services That Will be Offered by the Merged Company.**

In their Opposition to the Applicants’ request for a declaratory judgment, the Applicants

regulatory regime that it intends to apply to the services affected by this transaction as

The Applicants continue to assert that this merger,

well as the SBC/AT&T transaction. The

“a strong, full-service provider capable of

the SBC/AT&T merger will create

services on a facilities basis nationwide.”<sup>50</sup> In their

delivering integrated, end-to-end ser

Joint Opposition, the Applicants reiterate many of the same supposed competitive and public interest benefits which will result from the creation of this new integrated IP network,<sup>51</sup> but they do not discuss the regulatory lens with which the Commission should view these new services. As EarthLink argued, the extent to which the mergers may be permissible under traditional antitrust analysis is directly affected by the regulatory regime applicable to the transmission services of the merged companies. Because the

<sup>49</sup> Joint Opp. at 85-86.

<sup>50</sup> *Id.* at 9.

<sup>51</sup> *See id.* at 8-13.

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combined companies of Verizon/MCI and SBC/AT&T would be both wholesale providers of transmission services as well as competitors in the retail Internet-based and

VoIP services markets. the extent to which the transmission services of the merged

ns 201 and 202 of the

ompetitive analysis of these

with the proposed merger is its

ght of this, if the transmission

ervices that the Applicants sell directly or indirectly to the public are

telecommunications services” as defined by the Communications Act, then those

ervices are subject to the requirements of sections 201 and 202 of the Communications

at which require that such services be sold upon request on reasonable and

companies will be governed by the obligations in section

Communications Act will have a direct impact on the c

proposed mergers.

As EarthLink stated above, its primary concern

effect on the availability of transmission services. In li

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conditions, there would be nothing to prevent the merged companies from using their end-to-end market power to deny competitors access to essential transmission services.

Although the Supreme Court recently upheld the Commission's discretionary classification of cable modem service as an "information service" in *Brand X*,<sup>53</sup> the Court specifically expressed no view on how the Commission should, or lawfully may, classify DSL service.<sup>53</sup> Thus, the Commission's classification of the transmission services that would be provided by both of the merged entities remains a key question, and one that must be addressed before the Commission may properly analyze the competitive effects of these mergers.

### Conclusion

There are numerous unanswered questions in the information provided by the Applicants. The Applicants still have not addressed the vertical integration concerns with this merger. There remains considerable concern that the proposed merger would give the merged firm both the incentive and the ability to leverage its market dominance in "last mile" facilities into the Internet backbone market and to de-peer current peering partners and force them to pay for transit. Most fundamentally, the Applicants' submission of new information still does not address the fact that once Verizon adds MCI's very large Internet backbone market share to its own substantial last mile facilities, the combined company will have both the ability and the incentive to use its comprehensive control over the network to diminish the ability of other companies to compete in the retail Internet-based services market. Unless and until the Applicants

<sup>53</sup> *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688 (2005), slip op. at 31.

no choice but to deny the

sufficiently address these concerns, the Commission has  
Application.

y submitted,

Respectfully

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July 15, 2005

CERTIFICATE OF SERVICE

I, Robert K. Magovern, do hereby certify that on this 15<sup>th</sup> day of July, 2005, I

~~EarthLink, Inc. to be 1) \_\_\_\_\_ have caused a confidential copy of the foregoing Response of Earth~~

~~\_\_\_\_\_ Bureau, 2) delivered in person to Gary Remondino of the Wireline Competition~~

~~\_\_\_\_\_ delivered by mail \_\_\_\_\_ delivered in person to the Secretary of the Commission, and 3) \_\_\_\_\_~~

~~\_\_\_\_\_ In addition, I certify, \_\_\_\_\_ counsel of record for Verizon Communications Inc. and MCL Inc.~~

~~\_\_\_\_\_ Inc. to be 1) delivered that I have caused redacted copies of the response of EarthLink~~

~~\_\_\_\_\_ the FCC via its \_\_\_\_\_ in person to the Secretary of the Commission, and 2) filed with~~

Electronic Comment Filing System in WC Docket No. 05-75