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August 26, 2005

EX PARTE

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

Throughout these proceedings, EarthLink has maintained that the combination of two companies with substantial market power in the last mile markets (Verizon and SBC) with two companies with global Internet backbones (MCI and AT&T) will allow the two combined companies to discriminate against their in-region retail competitors in two significant ways. First, once the mergers are consummated, IP-based traffic that either originates from or is destined for either the SBC/AT&T or Verizon/MCI network will traverse the merged companies' respective Internet backbones, allowing the merged companies the opportunity to selectively degrade the transmissions of their retail competitors. Second, the merged companies will be able to de-peer or threaten to de-peer either their retail competitors directly, or the Internet backbone providers (IBPs) that their competitors rely on to deliver their services to end users. With respect to both scenarios, EarthLink has urged the Commission to carefully examine how the proposed mergers will change both the *incentive* and the *ability* of the merged companies to discriminate against their retail end user competitors within their respective territories.

On July 26, 2005, SBC/AT&T disputed EarthLink's claim that the merged company would be able to selectively degrade the service of its competitors, stating that EarthLink "completely ignored the manner in which VoIP service is provisioned."¹ With respect to targeted de-peering concerns, SBC/AT&T stated that it had "thoroughly explored both the facts and economic theory" to show why de-peering claims are not warranted.² Similarly, in its August 8, 2005 filing, Verizon/MCI states that "the premise

¹ SBC/AT&T Letter, July 26, 2005, at 3.

² *Id.* at 6.

of EarthLink's argument is *factually* wrong,"³ suggesting instead that the facts indicate that the combined company would be unable to degrade its competitors' services,⁴ or engage in targeted de-peering.⁵ As we demonstrate below, each of these arguments from the Applicants is fundamentally flawed. Moreover, in the context of determining the ultimate issues regarding the competitive impact of the mergers and whether the public interest is served, the parties' most recent exchanges emphasize that there are several substantial and material questions of *fact* that remain in dispute. These factual disputes center on the fundamental questions of: (1) how the telecommunications networks involved in these mergers operate today; (2) how those networks will operate after the mergers are consummated; and (3) to what extent the operation of the post-merger networks will provide the merged companies the ability to discriminate against their in-region retail competitors using the two methods described above. In this filing, EarthLink addresses these outstanding factual issues and responds to the relevant factual misstatements the Applicants make in their most recent filings. To supplement this response, EarthLink attaches the declaration of Greg Collins, Director of Network Engineering and Operations for EarthLink. In his declaration, Mr. Collins explains the factual basis for EarthLink's merger concerns, focusing on the how the networks in question function today, and how their post-merger functionality will allow the merged companies to discriminate against their retail competitors.

In addition to providing a discussion of the core factual disputes in these proceedings, EarthLink hereby respectfully requests that the Commission hold an evidentiary hearing in each of the above-referenced proceedings to determine whether the Applications satisfy "the public interest, convenience, and necessity."⁶ Section 309(e) of the Communications Act requires the FCC to hold a formal hearing on any merger where there is a "substantial and material question of fact presented" or where the Commission cannot otherwise make the determination that the transaction is in the public interest.⁷ These mergers more than meet that test. Critical questions about whether consumers will continue to have competitive options if the mergers are approved can only be answered if the Commission thoroughly reviews and understands in detail how the networks will function after the mergers, and how the merged companies will use these networks to interact with other Internet backbone providers (IBPs), their retail competitors, and one another. Supported by Mr. Collins' declaration, EarthLink has put the necessary factual information on the record to require a finding that the combined companies will have both the *incentive* and the *ability* to discriminate against their retail competitors within their respective territories, thus reducing competition and consumer choice. To date, the

³ Verizon/MCI Letter, August 8, 2005, at 2 (emphasis added).

⁴ *Id.* at 10-11.

⁵ *Id.* at 4.

⁶ 47 U.S.C. §309(e).

⁷ *Id.*

Applicants have offered nothing to dispute these facts beyond generalities as to why these mergers should be approved and unsubstantiated arguments by counsel speculating as to how these networks will operate post-merger. As EarthLink discusses in greater detail below, in many cases the Applicants' arguments are premised on factual inaccuracies. At this point in both proceedings the record is clear: the Commission must deny the Applications because both sets of Applicants have failed to meet their burden of proving that the mergers are in the public interest. Should either of the Applicants take issue with EarthLink's presentation of the outstanding factual questions and supplement the record with their own expert testimony regarding the functionality of the networks, there will be an even greater need for an evidentiary hearing to resolve the factual disputes between the parties.⁸

I. The Merged Companies Will Have the Incentive and the Ability to Selectively Degrade the Transmission of Their Competitors After the Mergers.

In their responses, both SBC/AT&T and Verizon/MCI state that the merged companies would lack the ability to selectively degrade the transmissions of their retail competitors.⁹ However, in each case, the Applicants' arguments depend on a fundamentally flawed view of how the networks function today, and how they will function after the mergers.

In its July 26, 2005, filing, SBC/AT&T attempts to respond to EarthLink's arguments that the merged company will be able to degrade both the Voice over Internet Protocol ("VoIP") and Internet access services of its competitors. Because the analysis for each type of service depends on a slightly different set of disputed facts, EarthLink addresses each separately.

With respect to VoIP service, SBC/AT&T states that the combination of AT&T's backbone with SBC's last mile assets poses no danger in the VoIP market for three reasons: (1) the vast majority of VoIP traffic is, and will for many years continue to be, delivered via the PSTN, and not via Internet backbone-to-Internet backbone transmissions; (2) to the extent VoIP traffic traverses an Internet backbone, the VoIP provider chooses which backbone it will use for traffic, and AT&T's Internet backbone is not a bottleneck through which competitive VoIP traffic must pass; and (3) should the merged company discriminate against another IBPs' VoIP traffic, it will suffer harm

⁸ EarthLink strongly supports Broadwing and SAVVIS' recent request for additional information from the Applicants. *See* Broadwing/SAVVIS Letter, Aug. 12, 2005, at Appendix A. That said, it has become clear that the Applicants continue to selectively dole out critical information on a piecemeal basis. As Broadwing and SAVVIS assert, the Applicants themselves are responsible for the incomplete records in these proceedings because they have deliberately refused to provide pertinent information that is available to them. *See id.* at 4. It is necessary, therefore, to not only obtain all the relevant information that the Applicants possess, but also to test that information through cross-examination in a formal hearing setting.

⁹ SBC/AT&T Letter at 3-5; Verizon/MCI Letter at 7-11.

relative to the other IBPs.¹⁰ Each of these three statements represents both a factual misunderstanding of VoIP functionality and also a misunderstanding of EarthLink's merger concerns.

With respect to SBC/AT&T's first statement, Mr. Collins notes in his declaration that SBC/AT&T has "spoken in abstract and conclusory terms when it states that VoIP traffic is 'delivered via the PSTN, and not via Internet backbone-to-Internet backbone.'"¹¹ First, the Applicants are incorrect that all VoIP calls today are connected in the same manner. In fact, VoIP calls today are routed in a number of different ways. Some VoIP calls are delivered via Internet backbone-to-Internet backbone transmissions, others travel on a single backbone before being delivered to the terminating central office, and some do not traverse the Internet backbone at all. When an EarthLink VoIP customer makes a call to an SBC VoIP customer today, for example, that call goes through several steps. As Mr. Collins recounts in paragraph 10 of his declaration, EarthLink first sends the IP call to Level 3. Level 3 takes the IP call as far as it can, at which point the packets are translated to an analog signal and the call is sent to SBC's central office. At the central office, SBC converts the call from analog back to IP and delivers the call to the end user.¹² Thus, with respect to an EarthLink VoIP-to-SBC VoIP call today, it is true that the call traverses only Level 3's (and not SBC's) long-haul or "backbone" network. However, the Applicants are simply wrong to suggest that this will be the case for the next 10, 15, or even 25 years.¹³ Mr. Collins estimates that within the next two years, about half of all VoIP calls will be routed to the end user using only Internet Protocol.¹⁴ As soon as this is the case, all in-region IP-based traffic that either originates from or is destined for either the SBC/AT&T or Verizon/MCI network will traverse the merged companies' Internet backbones. Once the traffic is on their respective backbones, each of the merged companies will be able to discriminate against that traffic in the manner described in paragraphs 5-7 in Mr. Collins' declaration.¹⁵

Even though all VoIP calls are not delivered "via Internet backbone-to-Internet backbone" today, this only tells half the story. The relevant factual question is how long it will take for a substantial portion of VoIP transmissions to be provisioned using IP-based backbone-to-backbone connections. Each of the Applicants has separately answered this question in the past, directly contradicting SBC/AT&T's most recent statement that it will take "many years." In November 2004, SBC announced that "VoIP

¹⁰ SBC/AT&T Letter at 4.

¹¹ Collins Declaration at ¶ 10.

¹² *Id.*

¹³ SBC/AT&T Letter at 4, n. 10.

¹⁴ Collins Declaration at ¶ 11.

¹⁵ *Id.* at ¶¶ 5-7.

systems [were] rapidly overtaking traditional voice systems,”¹⁶ and that the company’s “full-scale VoIP service rollout would take place in early 2005.”¹⁷ At that time, SBC announced it would offer VoIP to 18 million customers by the end of 2007—representing over a third of SBC’s total voice subscribers.¹⁸ Similarly, in January 2004, Verizon announced that it would “dramatically accelerate the evolution of its nationwide wireline network to packet-switching technology,” teaming with Nortel to replace its circuit switches with IP softswitches over an 18-month period.¹⁹ By December 2004, Verizon was reported “to be the furthest along [of all the RBOCs] in the circuit-to-packet transition.”²⁰ By June 2003, MCI was already more than two-thirds of the way through a conversion from circuit-based telephone service to VoIP, and announced that it would move “100% of its voice traffic to a core IP network by 2005.”²¹ Thus, the Applicants’ own statements reveal that the vast majority of VoIP calls will be routed using IP in the very near future. As a factual matter, SBC/AT&T’s first statement is simply wrong.

SBC/AT&T’s second statement is that, to the extent that VoIP traffic does traverse an Internet backbone, it is the VoIP provider that chooses the backbone.²² EarthLink has already shown that this premise is flawed. Using the EarthLink VoIP-to-SBC VoIP call example above, although it is true that, under some circumstances, EarthLink chooses the *first* backbone (in this case, Level 3), this again only tells half the story. When the vast majority of VoIP calls are routed via Internet backbone-to-Internet backbone, there will by definition be at least two backbones involved. As Mr. Collins confirms in his declaration, every call involving traffic that either originates from or is destined to a customer connected to either of the merged companies’ networks—regardless of whether that customer is a customer of the merged company or another provider—will by default go over the merged companies’ respective Internet backbones.²³ For purposes of the merged company’s ability to discriminate, it is only this latter backbone that is significant, because the ability to discriminate depends solely on

¹⁶ SBC Website, “SBC IP Telephony Complete: The IPT Complete Story,” available at <http://www.sbc.com/gen/press-room?pid=6588>.

¹⁷ Press Release, “SBC Announces Launch of Residential VoIP Service: Another Step Forward in the SBC IP Transformation” (Nov. 16, 2004).

¹⁸ Jay Wrolstad, “SBC Plans Nationwide VoIP Rollout,” NewsFactor Network News (Nov. 17, 2004).

¹⁹ Press Release, “Verizon Selects Nortel Networks To Accelerate Building of Nation’s Largest Converged, Packet-Switched Wireline Network Using Voice-Over-IP Technology” (Jan. 7, 2004).

²⁰ REDNOVA News, “Verizon Takes Next Big Step Towards VoIP” (Dec. 24, 2004).

²¹ Goldman Sachs, “Telecom Services in the United States: New Industry Perspective,” at 7 (July 7, 2003). See also Grant Cross, “MCI Joins With Nortel to Shift to IP-Based Network,” NetworkWorld (June 3, 2003).

²² SBC/AT&T Letter at 4.

²³ Collins Declaration at ¶¶ 11-12.

whether that traffic crosses the merged companies' backbones, not on how many other networks that traffic might also touch.²⁴

SBC/AT&T's third statement is that, should the merged company discriminate against another IBPs' VoIP traffic, it will suffer harm relative to other IBPs, rendering such a scheme not profitable.²⁵ The Applicants miss the point. As Mr. Collins stated in paragraph 4 of his declaration, there are *two* significant ways that the merged companies can discriminate after the mergers: (1) targeted de-peering of the merged companies' retail competitors or the IBPs that their retail competitors rely on to deliver their services, and (2) selective degradation of the merged companies' retail competitors' transmission.²⁶ In its July 15, 2005, filing, EarthLink stated that if SBC/AT&T de-peered a hypothetical IBP "Z," then the 1 million Cox VoIP customers served by IBP "Z" would not be able to connect to any of SBC/AT&T's 45 million voice customers. EarthLink raised this example simply to illustrate one of the mechanisms available to the merged companies to discriminate.²⁷ While the Applicants have offered no evidence to dispute that complete disconnection or de-peering would indeed be *possible* after the mergers (nor is it at all clear whether the merged companies would suffer sufficient harm relative to the remaining IBPs to prevent use of this method), the much more *likely* form of discrimination would be targeted degradation of traffic from retail competitors. The Applicants' third statement above does not address this second method of discrimination at all.

Using selective degradation, Mr. Collins states that the merged company would be able to harm the incoming traffic of one of its targeted competitors once that traffic hits the merged company's backbone without degrading its own outgoing traffic at all. In this instance, the harm will fall almost exclusively on the targeted company.²⁸ A

²⁴ *Id.* at ¶ 12.

²⁵ SBC/AT&T Letter at 4.

²⁶ Collins Declaration at ¶ 4.

²⁷ SBC/AT&T's review of the "undisputed" facts on page 1 of its letter is incorrect. SBC/AT&T suggests that despite EarthLink's submissions, the Applicants will not engage in global or targeted de-peering. In fact, several parties—not just EarthLink—have disputed this fact. In their August 12, 2005, letter, Broadwing and SAVVIS state that the Applicants' de-peering argument relies on several demonstrably false claims. See Broadwing/SAVVIS Letter, Aug. 12, 2005, at 9-10. With respect to SBC/AT&T or Verizon/MCI de-peering EarthLink directly, as discussed in greater detail below, because the Applicants have never denied that this will happen, it must be deemed to have been conceded that it will. SBC/AT&T is also incorrect that it is factually undisputed that the Internet backbone is not concentrated today. Although EarthLink has not taken the lead with such horizontal merger concerns, other commenters have raised them and EarthLink has noted them in its various submissions. On this issue, Broadwing and SAVVIS note that the Applicants have failed to provide the requisite information regarding their backbones' (1) current size, and (2) future growth after the mergers, sufficient for the Commission to find that—as SBC/AT&T suggests—the backbone market is now operating and will continue to operate competitively. See Broadwing/SAVVIS Letter at 4-8. See also Comments of the New York Attorney General, Docket No. 05-75, May, 9, 2005, at 13-23; Reply Comments of BT Americas Inc., Docket No. 05-65, May 10, 2005, at 22-29.

²⁸ Collins Declaration at ¶ 13.

customer whose service *never* works in-region (i.e., a customer of a degraded provider) is likely to blame his own carrier for the problem. However, as Mr. Collins states in paragraph 13 of his declaration, if the merged companies pursued a strategy of targeted degradation, the customer of the merged company would only notice a loss of service quality when contacted by a customer of the degraded company. Under those circumstances, the customer of the merged company is likely to assume that the problem is not with his or her own service, and therefore would be unlikely to switch service providers, especially if switching required payment of an early termination penalty. Thus, using selective degradation, the merged companies will be able to harm the incoming traffic of its targeted competitors, with very little harm at all to its own service or its relationship with its customers.²⁹

In its August 8, 2005, response, Verizon/MCI suggests that selective degradation of its retail competitors' traffic is "impractical" due to a number of "technical obstacles."³⁰ Specifically, Verizon/MCI asserts that, for selective degradation to be possible after the merger, (1) hardware and software capable of identifying the source of the traffic must be installed, (2) a substantial staff must be maintained at every conceivable traffic exchange point to monitor and change routing patterns, and (3) selective degradation could be defeated by "spammers" employed by ISPs. Each of these three statements is factually incorrect. First, as Mr. Collins explains in paragraph 8 of his declaration, Verizon's network—indeed *all* major networks—are already capable today of identifying incoming traffic.³¹ The Applicants' own descriptions of how backbone services work demonstrate that this is so. As the Applicants have all stated, IBPs will only peer with other IBPs as long as it is economically beneficial to do so. In this regard, every IBP has its own internal eligibility requirements for peering and transit

²⁹ In its August 8, 2005, response, Verizon/MCI repeats SBC/AT&T's argument that if the merged company degraded the traffic of competing service providers, it would harm its own end users attempting to use the service in question, which would give those end users an incentive to switch to another broadband provider. Verizon/MCI Letter at 7. Verizon/MCI attempts to bolster this incentive by alleging that 90 percent of all U.S. households have access to a broadband provider other than their local telephone company. Verizon/MCI Letter at 8. For the reasons stated above, targeted degradation of the transmission of one of Verizon/MCI's competitors could be accomplished with virtually no harm to the merged company's own service or its relationship with its customers. Accordingly, Verizon/MCI's allegation that 90% of all U.S. households have access to another broadband provider other than their local phone company is irrelevant. As a matter of fact, however, the Commission has found that the relevant geographic market for broadband Internet access services is local, and therefore Verizon/MCI's national data provides no meaningful insight as to the availability of competitive broadband services in each locality. While EarthLink notes that data supplied by Verizon/MCI shows that cable modem service is available to 75-94% of subscribers in the Top 4 MSAs in California, we also note that the general public does not consist of only the selected MSAs the Applicants choose to cite to support its own arguments. Verizon/MCI Letter at 9-10. For the purposes of a meaningful competitive analysis, the Applicants have only begun to scratch the surface. In any event, even their own data indicates that large numbers of consumers would have no competitive alternatives if the merged companies targeted independent service providers in the manner described in Mr. Collins' declaration. See Collins Declaration at ¶¶ 5-7.

³⁰ Verizon/MCI Letter at 10.

³¹ Collins Declaration at ¶ 8.

relationships, such as minimum private connection speed, traffic mix, and in/out traffic ratios. Therefore, no peering arrangement could be implemented unless the amount, nature, and source of all incoming traffic were readily identifiable. Thus, neither Applicant's network would require any "massive undertaking" to install additional hardware or software to identify the source of packets. Their networks are already configured to do just this.

Second, Verizon/MCI's statement that it must hire and maintain a substantial staff to monitor and change routing patterns of traffic at "every conceivable point where traffic is exchanged" is factually incorrect and ignores a fundamental aspect of EarthLink's merger concerns.³² As Mr. Collins states in paragraph 8, the only place where the merged companies have an incentive to degrade services is within their own territories, where they stand to take retail customers away from their competitors.³³ That the merged companies' networks are already able to identify the source of incoming traffic onto their networks is the only relevant concern regarding the merged companies' technical ability to discriminate. Finally, Verizon/MCI suggests that selective degradation is easily identifiable and therefore easily defeated. However, Mr. Collins states that many instances of targeted service degradation are both random and episodic, and that it is impossible for one network to identify the internal settings of another network. Therefore, contrary to Verizon/MCI's claim, it would in fact be extremely difficult to detect and defeat the source of targeted degradation.³⁴

Additionally, both SBC/AT&T and Verizon/MCI argue that targeted degradation is not a concern because the Commission in *Madison River* demonstrated its ability to deal with such conduct.³⁵ *Madison River* involved an instance where a carrier blocked Vonage's VoIP traffic at the carrier's last mile facilities. In fact, *Madison River* demonstrated *nothing* about the Commission's ability to deal with the issues raised here. First, the Commission in *Madison River* deliberately sidestepped the VoIP classification issue, and in doing so expressly avoided stating on what basis it could take any action

³² Both SBC/AT&T and Verizon/MCI erroneously suggest that EarthLink's argument depends on both Applicants acquiring market power in the backbone market. SBC/AT&T Letter at 2; Verizon/MCI Letter at 1. Because the merged companies, however, only have the incentive to discriminate in their own territories, the Applicants are incorrect. It is not necessary for Applicants to acquire traditional backbone market power for either merged company to engage in selective degradation or targeted de-peering. As Mr. Collins states in his declaration in paragraph 12, all post-merger IP traffic that either originates from or is destined to a customer connected to the merged companies' networks by default will go over the merged companies' respective Internet backbones. See Collins Declaration at ¶ 12. See also Declaration of Christopher Rice at ¶¶ 7-8 (stating that SBC will move all its "internet-bound traffic...onto AT&T's network...allowing [SBC] to take on AT&T's Tier 1 [Internet backbone] status."). For purposes of the merged companies' ability and incentive to discriminate, all other traffic originating or terminating outside the merged companies' territories is irrelevant. See Collins Declaration at ¶ 8.

³³ Collins Declaration at ¶ 8.

³⁴ *Id.* at ¶ 7.

³⁵ SBC/AT&T Letter at 3; Verizon/MCI Letter at 10-11 (citing *Madison River Communications LLC*, File No. EB-05-IH-0110, DA 05-543 (rel. Mar. 3, 2005)).

against Madison River's attempt to block VoIP traffic. Given the uncertain regulatory status of VoIP, it is unclear whether the Commission will retain any authority to prevent such tactics at all. Second, even if there were a regulatory solution, the Applicants again overlook the *merger-specific* concern that was not present in *Madison River*. The global backbones that SBC and Verizon will acquire, over which a substantial amount of VoIP traffic will traverse in the very near future, have *never* been regulated by the Commission. At no point has either of the Applicants disputed this fact. Thus, contrary to SBC's recent statement responding to Cox suggesting that targeted degradation is somehow only an "edge" (i.e. last-mile) issue that the Commission is capable of monitoring,³⁶ the unregulated backbones that SBC and Verizon will acquire now give the merged companies a second place (away from the "edge") where they can avoid detection and regulation and can therefore discriminate against their competitors' traffic.

Finally, in its July 15, 2005, response to SBC/AT&T, EarthLink discussed the ability of the merged company to discriminate against both VoIP and Internet access service. As stated above, although SBC/AT&T's most recent response focuses almost entirely on the merged company's ability to discriminate against its competitors' VoIP traffic, the Applicants did raise one argument with respect to the merged company's ability to discriminate against a competitors' Internet access service as well. While the mechanisms for discrimination discussed in Mr. Collins' declaration at paragraphs 5-7 are the same for both services, SBC/AT&T claimed that EarthLink's arguments specifically relating to discrimination of Internet access services were unfounded because "ILECs do not control dial-up Internet users served by other providers."³⁷ The Applicants suggest that, to the extent SBC's local phone customers access the Internet via dial-up service, those customers are controlled by the dial-up ISPs that they pay for Internet access service (like EarthLink and AOL). However, in an attempt to downplay the significance of SBC's control over end user analog lines in SBC territory, the Applicants have ignored relevant facts.

As Mr. Collins states in paragraph 14 of his declaration, the extent to which ILECs control the choice of Internet backbones used by dial-up Internet users is dependent on whether the ISP that serves that customer is a "Layer 2" or "Layer 3" wholesale customer of the BOC.³⁸ Both Verizon and SBC today offer independent ISPs two different levels of transmission capacity for both dial-up and DSL Internet-bound traffic: a "Layer 2" product and a "Layer 3" product. For DSL, the Layer 2 product includes the local DSL-enabled loop and ATM or frame relay transport to the ILEC's central office. The Layer 3 product includes the Layer 2 functionality and adds both a central office-located DSL termination device as well as the backbone transport to the Internet. For dial-up, the Layer 3 service is commonly known as "managed-modem service." In response to SBC's claim that ILECs do not control dial-up Internet users, to the extent the ISP customer is a "Layer 2" customer, this statement is true because the

³⁶ SBC/AT&T Cox Letter, August 15, 2005, at 4.

³⁷ SBC/AT&T Letter at 2-3.

³⁸ Collins Declaration at ¶ 14.

ISP itself—and not the ILEC—chooses the backbone provider. However, if the ISP customer is a “Layer 3” or “managed modem service” customer, then the ISP retains no control over which backbone is selected to carry the traffic. Furthermore, if the ILEC is itself the managed modem service provider (and both SBC and Verizon provide that service), then the ILEC retains exclusive control over the dial-up Internet user’s traffic, for the purposes relevant here, regardless of that customer’s chosen Internet access service provider.³⁹

Today, approximately 70% of EarthLink’s dial-up service is “managed modem service.” Although today EarthLink gets much of its managed modem service from Level 3, Level 3 depends on BOC facilities to provide that service. Thus, after the merged companies incorporate the backbone assets of AT&T and MCI into their networks, the Applicants will have the incentive and ability to steer independent Layer 3 providers like Level 3 to the Internet backbones of the merged companies. The combination of Layer 3 service with the Applicants’ ownership and control of the backbone will therefore give the Applicants a substantially increased ability to discriminate in the manner described by Mr. Collins in paragraph 5-7 of his declaration.

II. The Merged Companies Will Have the Incentive and the Ability to De-Peer or Threaten to De-Peer After the Mergers.

Both SBC/AT&T and Verizon/MCI also state that the mergers would not create the potential for the merged companies to de-peer or threaten to de-peer either their retail competitors directly, or the IBPs those competitors rely on to serve their customers.⁴⁰ Additionally, both Applicants further suggest that, even if the merged companies de-peered an IBP that their retail competitors relied on, EarthLink and others could simply switch to another Tier 1 backbone provider.⁴¹ With respect to the potential for de-peering of retail competitors such as EarthLink, the Applicants’ arguments directly conflict with past instances of post-merger de-peering. With respect to switching backbone providers should de-peering occur, the Applicants’ arguments again rely on an incorrect understanding of how the networks are structured and how they operate.

Despite the Applicants’ continued assertions that they would be unable to de-peer following the mergers, Mr. Collins states that within the last three years, whenever there has been a merger involving the combination of Internet backbone assets, EarthLink has been de-peered post-merger.⁴² Furthermore, in each instance, EarthLink has received calls from the sales departments of the merged companies offering to sell EarthLink Internet transit service in order to restore the quality connections previously experienced through settlement-free peering. The Applicants have offered absolutely no reason why

³⁹ *Id.*

⁴⁰ SBC/AT&T Letter at 5-6; Verizon/MCI Letter at 4-7.

⁴¹ SBC/AT&T Letter at 5; Verizon/MCI Letter at 12-13.

⁴² Collins Declaration at ¶ 19.

the situation would be any different following these mergers. In fact, EarthLink has stated several times throughout these proceedings that it expects to be de-peered by both SBC and Verizon (with which it currently peers) after the mergers are consummated. Although the Applicants have chosen to respond to EarthLink on several occasions, not once has either Verizon/MCI or SBC/AT&T denied that it would de-peer from EarthLink post-merger. Therefore, it is reasonable for EarthLink to conclude that, in fact, both companies will choose to de-peer. Moreover, the Commission should be concerned that many other providers like EarthLink will find themselves in the very same position.⁴³

Regarding the technical ability of EarthLink and others to switch IBPs should the merged companies de-peer an IBP that its retail competitors relied on, the Applicants grossly understate the difficulty and expense involved in switching IBPs.⁴⁴ For EarthLink to switch IBPs if, for example, Level 3 were de-peered, would require the addition of many special access circuits. This is so because EarthLink has set up its network to be physically close to Level 3's network. If EarthLink were forced to switch to another IBP not as close as Level 3, it would have to purchase special access lines to provide links at multiple points between EarthLink's network and the network of the new IBP in order to obtain adequate interconnection with a new network. Moreover, those special access connections are most often available only from the BOCs, the parties that would, in the example above, be causing the discrimination that would require EarthLink to switch to a new IBP in the first place.⁴⁵ Finally, even after all of this, EarthLink's traffic could still be targeted and degraded by either merged company in the manner described in Mr. Collins' declaration as soon as it passes from the new IBP to the respective backbones of the merged companies.⁴⁶

III. Request For An Evidentiary Hearing.

Pursuant to section 309(e) of the Communications Act, EarthLink respectfully requests that the Commission hold an evidentiary hearing to decide whether the Application in the above-referenced proceeding satisfies "the public interest, convenience, and necessity."⁴⁷ These parallel mergers are the most important

⁴³ *Id.* at ¶ 20 (stating that he expects many providers to be de-peered post-merger, which will raise overall costs of doing business for a significant number of companies leading to an increase in consumer prices).

⁴⁴ Verizon/MCI suggests that if cable companies chose not to leave Verizon/MCI because they are the low-cost provider, than this would suggest that Verizon/MCI is not exercising backbone market power to increase its prices. Verizon/MCI Letter at 13-14. Verizon, however, has the relationships mixed up. It is not that cable companies would be forced to leave Verizon/MCI's backbone, but instead they would be forced to leave another lower-priced IBP's backbone like Level 3 should Verizon/MCI choose to de-peer that IBP.

⁴⁵ Collins Declaration at ¶ 22.

⁴⁶ *Id.* at ¶¶ 5-7.

⁴⁷ 47 U.S.C. §309(e).

telecommunications mergers ever undertaken in the United States. In their respective regions, each merger essentially reassembles the vertical monopoly that the AT&T break-up removed in 1982. However, because the telecommunications industry is so much more critical today to virtually every sector of the national economy than it was twenty years ago, the consequences of a substantial loss of competitive choices are much greater now than in the past. When AT&T was broken up twenty years ago, the primary service at issue was voice telephony. Today, the services affected include broadband Internet access and all of the advanced applications and transactions that rely on broadband transmission—in short, the entire advanced telecommunications network that the Applicants assert they will create after the mergers. The amount of personal, government, and business information that moves over the communications system today dwarfs what moved twenty, ten, or even five years ago. Indeed, since the advent of the commercial Internet, there is no model or historic precedent for these mergers. It is therefore critical for the Commission to understand how any fundamental change in the control and operation of these telecommunications networks will affect competition.

Under section 309(e) of the Act, the Commission is required to hold an evidentiary hearing on transfer of control applications if “a substantial and material question of fact is presented” or if the Commission for any reason is unable to make the finding that the public interest, convenience, and necessity will be served by the grant of the application.⁴⁸ According to Commission precedent, if a party wishes for the Commission to hold an evidentiary hearing to address a question of fact, the party must satisfy a two-prong test by means of a petition to deny.⁴⁹ First, a petitioning party must submit a petition containing “specific allegations of fact sufficient to show that...a grant of the application would be prima facie inconsistent with [the public interest].”⁵⁰ Second, the petition must present to the Commission a “substantial and material question of fact.”⁵¹

To satisfy the first prong, the D.C. Circuit has held that the allegations set forth by the petitioning party must be supported by an affidavit, and be “specific evidentiary facts, not ultimate conclusionary facts or more general allegations....”⁵² The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a judge’s consideration of a motion for directed verdict: “if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.”⁵³ EarthLink’s Petition to Deny and subsequent filings,

⁴⁸ *Id.*

⁴⁹ MCI/WorldCom Order at ¶ 202; Bell Atlantic/GTE Order at ¶ 434; SBC/Ameritech Order at ¶ 575.

⁵⁰ *See, e.g.,* MCI/WorldCom Order at ¶ 202. *See also Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); *Astroline Communications Company Ltd. v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988).

⁵¹ 47 U.S.C. § 309(d)(2).

⁵² *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980).

⁵³ *See Genom*, 832 F.2d at 181.

supported by Mr. Collins' declaration, clearly demonstrate the combined companies will have both the *incentive* and the *ability* to discriminate against their retail competitors within their respective territories, and therefore that the mergers would be *prima facie* inconsistent with the public interest.

To determine whether the second prong is met, the Commission reviews "the application, the pleadings filed, or other matters which [the Commission] may officially notice"⁵⁴ to conclude whether the "totality of the evidence arouses a sufficient doubt" as to whether the grant of the application would serve the public interest.⁵⁵ The Applicants' own filings confirm that the debate has now focused on several substantial and material questions of *fact*. In evaluating whether a petitioner has satisfied the two-prong test, the D.C. Circuit has held that petitioners must assert more than only "legal and economic considerations concerning market structure, competitive effect, and the public interest."⁵⁶ As EarthLink has demonstrated, the fundamental issues disputed in these proceedings do not concern merely the ultimate issues of the competitive impact of the mergers or the public interest, but instead center on the underlying facts about how the networks function—facts that the Commission must ascertain before it can make the required statutory findings. Although the Commission must ultimately decide whether the public interest is served by these mergers, critical questions about whether retail competition will survive if the mergers are approved can only be answered if the Commission thoroughly reviews and understands in detail how the networks function today, how they will function after the mergers, and how the merged companies will use these networks to interact with other IBPs, their retail competitors, and one another. Accordingly, EarthLink requests that the Commission designate both proceedings for an evidentiary hearing on the following issues:

Verizon/MCI

Issue 1: In order to determine the extent to which Internet end users could switch to alternative providers if their service was degraded:

- a. How many MSAs within the 29 states (and the District of Columbia) in Verizon territory have competitive broadband alternatives? In Verizon's Top 50 MSAs, what is the factual basis for Verizon's claim that alternatives exist? Has a local market analysis been conducted on any basis other than counting *any* presence by a carrier in a zip code as constituting service by that carrier

⁵⁴ *Id.*

⁵⁵ *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998). A court may disturb the Commission's decision to deny an evidentiary hearing only if, upon examination of the Commission's statement of reasons for denial, the court determines the Commission's decision to be arbitrary and capricious. *See Astroline*, 857 F.2d at 1562.

⁵⁶ *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1496-97 (D.C. Cir. 1995).

throughout the entire zip code? How are the boundaries of local markets defined?

- b. Are there broadband alternatives in the rural areas currently served by Verizon?

Issue 2: In order to determine how soon a substantial majority of Internet traffic will traverse the merged company's Internet backbone and thus be subject to unregulated control by Verizon/MCI:

- a. How far along are Verizon and MCI in transitioning from a circuit-switched to a packet-switched network?
- b. What are Verizon/MCI's post-merger plans for transitioning its network to an IP platform?
- c. At one, two, and three years after the merger is consummated, what percentage of VoIP traffic in Verizon territory will be transported over the Verizon/MCI Internet backbone at any time during the transmission of the call?
- d. At one, two, and three years after the merger is consummated, what percentage of all traffic on the Verizon/MCI network will be IP?
- e. How are VoIP calls routed today? Are there a variety of routing paths for VoIP calls or are they all the same? What percentage of VoIP calls today are terminated through an Internet backbone-to-Internet backbone connection?

Issue 3: In order to determine the merged company's ability to identify and discriminate against the Internet traffic of one of its competitors:

- a. Are Verizon and MCI's networks currently configured to identify and prioritize traffic by source (i.e. end user), protocol (i.e. email, VoIP, etc.), origin/destination, and/or volume? Can traffic be classified using any combination of the above methods?
- b. What are the existing, planned, and potential capabilities of the Verizon/MCI Internet backbone network in terms of identifying and prioritizing traffic traversing that network?
- c. For both DSL and dial-up based Internet access services, to what degree are "Layer 3" and "managed modem" services used by ISPs that are not affiliated with Verizon?
- d. To what extent does Verizon or MCI offer Layer 3 or managed modem service to independent ISPs?
- e. For Layer 3 and managed modem services offered to independent ISPs by carriers other than Verizon, to what degree do those services rely on the use of Verizon facilities?

Issue 4: In order to determine the ability of the Commission and the merged company's competitors to identify the source of any service degradation:

- a. Is it possible for one network to identify the traffic classification criteria of another network?

Issue 5: In order to determine the extent to which cable companies and other IBPs are able to counter anti-competitive conduct by the merged company:

- a. How are backbone networks physically structured? Are they set up to be geographically close to other networks for purposes of interconnection?
- b. Would switching Internet backbones by a provider of retail services entail a great degree of technical difficulty and expense?

SBC/AT&T

Issue 1: In order to determine the extent to which Internet end users could switch to alternative providers if their service was degraded:

- a. How many local geographic markets within the 13 states in SBC territory have competitive choices for broadband? Has a local market analysis been conducted on any basis other than counting *any* presence by a carrier in a zip code as constituting service by that carrier *throughout* the entire zip code? How are the boundaries of local markets defined?
- b. Are there sufficient broadband alternatives in the rural areas currently served by SBC?

Issue 2: In order to determine how soon a substantial majority of Internet traffic will traverse the merged company's Internet backbone and thus be subject to unregulated control by SBC/AT&T:

- a. How far along are SBC and AT&T in transitioning from a circuit-switched to a packet-switched network?
- b. What are SBC/AT&T's post-merger plans for transitioning its network to an IP platform?
- c. At one, two, and three years after the merger is consummated, what percentage of VoIP traffic in SBC territory will be transported over the SBC/AT&T Internet backbone at any time during the transmission of the call?
- d. At one, two, and three years after the merger is consummated, what percentage of all traffic on the SBC/AT&T network will be IP?
- e. How are VoIP calls routed today? Are there a variety of routing paths for VoIP calls or are they all the same? What percentage of VoIP calls today are terminated through an Internet backbone-to-Internet backbone connection?

Issue 3: In order to determine the merged company's ability to identify and discriminate against the Internet traffic of one of its competitors:

- a. Are SBC and AT&T's networks currently configured to identify and prioritize traffic by source (i.e. end user), protocol (i.e. email, VoIP, etc.),

- origin/destination, and/or volume? Can traffic be classified using any combination of the above methods?
- b. What are the existing, planned, and potential capabilities of the SBC/AT&T Internet backbone network in terms of identifying and prioritizing traffic traversing that network?
 - c. For both DSL and dial-up based Internet access services, to what degree are “Layer 3” and “managed modem” services used by ISPs that are not affiliated with SBC?
 - d. To what extent does SBC or AT&T offer Layer 3 or managed modem service to independent ISPs?
 - e. For Layer 3 and managed modem services offered to independent ISPs by carriers other than SBC, to what degree do those services rely on the use of SBC facilities?

Issue 4: In order to determine the ability of the Commission and the merged company’s competitors to identify the source of any service degradation:

- a. Is it possible for one network to identify the traffic classification criteria of another network?

Issue 5: In order to determine the extent to which cable companies and other IBPs are able to counter anti-competitive conduct by the merged company:

- a. How are backbone networks physically structured? Are they set up to be geographically close to other networks for purposes of interconnection?
- b. Would switching Internet backbones by a provider of retail services entail a great degree of technical difficulty and expense?

For all of the reasons stated above, in the attached declaration of Greg Collins, and in EarthLink’s prior submissions, the Applications for transfer of control must be denied, or these transactions must be promptly set for formal hearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, John W. Butler, do hereby certify on this 26th day of August, 2005, that I have caused the foregoing Letter of EarthLink, Inc. and Declaration of Greg Collins, to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket Nos. 05-65 and 05-75; and 2) served via electronic mail on counsel of record for SBC Communications Inc., AT&T Corp., Verizon Communications Inc., and MCI, Inc., as indicated below.

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