September 8, 2005

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AT&T Corp., Transferor, to SBC Communications Inc., Transferee, WC Docket No 05-65***

Dear Ms. Dortch:

We are writing on behalf of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") in response to the *ex parte* letter dated August 26, 2005, from EarthLink, Inc. ("EarthLink") and the accompanying Declaration of Greg Collins (the "Collins Declaration"). The Commission should reject EarthLink's request for an evidentiary hearing to consider its claims that the SBC/AT&T merger will lead to selective degradation and de-peering of competing Internet providers. We already have thoroughly debunked EarthLink's arguments about selective degradation and de-peering, and – since EarthLink has failed to raise any substantial and material questions of fact about whether the merger is in the public interest – the standard for designation for hearing has not been satisfied.

Selective Degradation

EarthLink continues to assert that the merged company will have the incentive and ability to use Internet Backbone assets to discriminate against in-region retail competitors.[1] But EarthLink's concerns are not merger-specific where, as here, SBC in region is already a vertically integrated supplier of Internet Backbone services, as well as retail ISP services.[2] Apart from the failure of EarthLink to acknowledge this pre-merger reality, EarthLink has

[1] EarthLink Letter at 2.

[2] In this regard, SBC notes that there are other vertically integrated Internet Backbone Providers ("IBPs"), including Qwest and Sprint, serving both business and residential retail customers and that still other IBPs are themselves retail ISPs to business customers. Despite all of this existing vertical integration, all of the commenters admit that the provision of retail ISP services today is highly competitive, as is the provision of Internet Backbone services, and none has shown how this transaction will reduce competition in either segment.

offered no evidence or argument to counter the facts and analysis set forth in the two declarations of Dr. Marius Schwartz. EarthLink claims that targeted degradation could occur, and that the degradation would harm the targeted provider more than it would harm SBC. But EarthLink has failed to rebut the essential point made by Dr. Schwartz that targeted degradation is not profitable so long as *both* EarthLink and SBC customers would suffer some reduction in quality relative to all other non-degraded providers if such degradation were to occur, which for the reasons stated before, it will not.[3] Thus, if an EarthLink VoIP customer experiences quality issues only when speaking to an SBC VoIP customer, and the SBC customer has quality issues only when communicating with an EarthLink customer, the risk is that both customers will terminate their service and migrate to, for example, a cable-based VoIP provider such as Cox or Comcast.[4]

Similarly, there is no need to debate the timeline for when VoIP calls will be handled on a backbone-to-backbone basis. The Collins Declaration offers up nothing more than the tautology that "once the majority of VoIP calls are routed on an Internet backbone-to-Internet backbone basis, by definition there will be at least two backbones involved."[5] But that says nothing about when the backbone-to-backbone hand-off will become commonplace, the costs involved, the fact that such an occurrence could not happen in a vacuum, i.e., many other networks would of necessity also have to undergo such a conversion, thereby ensuring that there would not be just two backbones that had undergone such a conversion, and a myriad of other facts and circumstances that would be implicated by such a hypothesized change but which were not addressed by Mr. Collins. EarthLink's attempts to muddy the waters by quoting statistics about VoIP "rollout" by SBC are similarly misplaced. The number of customers that are offered VoIP is not relevant to the ultimate issues of how many will subscribe, how the VoIP services will be provisioned, or by whom such services will be offered.

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[3] In determining not to refer the SBC/AT&T transaction to the UK Competition Commission, the UK Office of Fair Trading recently noted the European Commission's finding that "a 'non-dominant network would need its competitors and their customer base too much to risk degrading the quality of its connectivity offering' applies to SBC post-merger." Office of Fair Trading, Anticipated Acquisition By SBC Communications Inc. of AT&T Corp. ¶ 66 (August 30, 2005).

[4] *See* Schwartz Reply Declaration, ¶ 31. According to IDC, cable modem VoIP subscribers outnumber DSL VoIP subscribers by more than two to one, and IDC predicts that ratio to hold through at least 2009. *See* IDC, U.S. Residential VoIP Services 2005-2009, Table 17 (March 2005). SBC also notes that EarthLink cannot seriously be arguing that it is the only source of competition to SBC at retail when EarthLink depends on third parties for broadband facilities. *See* EarthLink 2004 Form 10-K, at 1, 7 & 8; Collins Declaration ¶ 15. By definition, if there are alternative facilities-based broadband providers, they provide competition to SBC.

[5] Collins Declaration ¶ 12.

Contrary to EarthLink's claim, the VoIP timelines offered in SBC's last response to EarthLink were not SBC's estimates, but those made by independent industry experts with no stake in the proposed merger. These experts have concluded that there are numerous hurdles that need to be overcome for Internet Backbone-to-Internet Backbone handoffs to become commonplace, and until those are overcome, the PSTN will be the primary method of delivering VoIP calls. Moreover, the PSTN will also remain a bypass option for an even longer period of time, as there will remain for many years millions of circuit-switched customers, even with the most optimistic predictions of VoIP adoption by consumers.

De-peering

EarthLink complains that SBC has not said what will happen to EarthLink's peering arrangements after the SBC/AT&T merger, but that statement is simply wrong. In his reply declaration, Christopher Rice, SBC's Executive Vice President – Network Planning and Engineering, stated:

> At least initially, all peers of the SBC backbone will continue in their current arrangement because, until the SBC and AT&T backbones are fully merged into a single network, the SBC backbone will retain its current autonomous system number ("ASN"), and SBC intends, post-closing, to continue peering with all parties (whether backbone, ISP or content provider) that it currently peers with. Therefore, at a minimum, even where industry practices would indicate potential changes in peering arrangements, such changes will occur only after both SBC and the other backbones have had ample opportunities to plan for new arrangements. Once the systems are integrated into a single ASN, there may be Tier 2 IBPs and ISPs that reach current SBC customers today for free, but who will have to pay for that access in the future because these companies do not, today, meet AT&T's criteria for settlement-free peering.[6]

Moreover, the Collins Declaration's discussion of situations in which EarthLink has been de-peered following recent Internet Backbone combinations shows that such de-peering is not the result of any market power – surely Mr. Collins cannot be suggesting that a company such as XO was exercising market power when it de-peered EarthLink. All that EarthLink's prior experience shows is that de-peering decisions are fully consistent with a competitive marketplace and are not inherently suspect, however harmful they may be to the de-peered competitor. The Commission should recognize EarthLink's arguments for what they are: a plea for a regulatory bailout from a company whose resale-based business model is suspect.

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[6] Rice Reply Declaration, ¶ 10.

Designation for Hearing

EarthLink's request to designate the SBC/AT&T merger applications for an evidentiary hearing is likewise just another attempt by EarthLink to delay the consummation of the merger and to misuse the regulatory process to advance its own agenda. As such, it should be denied. In addition to its obvious procedural defects,[7] EarthLink's request fails to satisfy the two-prong test used to determine whether a "factual question is substantial enough to justify the burden of an evidentiary hearing."[8]

First, the Commission must determine "whether the petition to deny sets forth 'specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity].'"[9] In order to satisfy this threshold inquiry, the allegations set forth in a petition to deny must be supported by an affidavit and "be specific evidentiary facts, not 'ultimate conclusionary facts or more general allegations.'"[10] Moreover, the affidavit must be based on personal knowledge, rather than

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[7] EarthLink's request for a hearing is procedurally deficient because it was set forth in an *ex parte* letter to the FCC rather than in a petition to deny supported by an affidavit. The Commission has found that 47 U.S.C. § 309(d)(1) requires that a request for an evidentiary hearing be made in a petition to deny supported by an affidavit. *SBC/Ameritech*, ¶ 579; *see also In re Applications of GTE Corp., Transferor and Bell Atlantic Corp. Transferee for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, ¶ 437 (2000) (same) ("*Bell Atlantic/GTE*"). In the instant case, EarthLink did not request a hearing in its petition to deny, but waited until August 26th, some four months after such a request should have been made, to seek a hearing. Accordingly, EarthLink's request is procedurally too late and must be denied. *See In re Minnesota PCS Ltd. Partnership (Assignor) K-25 Wireless, L.P. (Assignee)*, Order, 17 FCC Rcd. 126 ¶ 5 (2002) (dismissing petition opposing assignment applications and requesting evidentiary hearing because petition was filed after the filing deadline for petitions to deny). EarthLink's timing makes clear its intent to disrupt and delay Commission consideration of the comprehensive record it has before it.

[8] *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 398 (D.C. Cir. 1985) (noting that Congress intended the Commission to have broad discretion to avoid time-consuming hearings whenever possible); *see also Gencom*, 832 F.2d at 181-82 ("In 1960, Congress amended section 309(d) of the Act to significantly heighten the burden a petitioner must satisfy in order to obtain an evidentiary hearing.").

[9] *Citizens for Jazz*, 775 F.2d at 394 (quoting 47 U.S.C. § 309(d)(1)).

[10] *In re Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18025, ¶ 203 (1998) ("*WorldCom/MCI*") (quoting *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980)).

second-hand information.[11] If the petition to deny does not satisfy this threshold requirement, "it can form no basis for an evidentiary hearing."[12]

Second, even if the Commission concludes that the petition to deny meets the threshold requirement, then the Commission also must determine, based on the record as a whole, that the petition to deny presents a substantial and material question of fact.[13] The ultimate question of fact placed in issue is "substantial" when "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for."[14] "The factual question whose substantiality is at issue for purposes of [this] determination . . . is the *ultimate* fact and not the proximate ones that are ordinarily the 'specific allegations of fact' set forth in the petition to deny and supported by affidavits."[15] At this stage of inquiry:

> [T]he Commission enjoys wider latitude in its determination whether the record as a whole presents a substantial and material question of fact warranting a hearing under Section 309(d)(2). … [T]he Commission may consider the entire record, weighing the petitioner's evidence against facts offered in rebuttal. Moreover, the Commission "may determine how much weight to accord disputed facts based on the record before it."[16]

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[11] *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor to SBC Communications, Inc., Transferee*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, ¶ 47 (1998) ("*SBC/SNET*"). At this initial stage, the Commission must consider whether, if all of the supporting facts alleged in the affidavit were true, a reasonable finder of fact could conclude that grant of the application would be prima facie inconsistent with the public interest. *WorldCom/MCI*, ¶ 203.

[12] *Citizens for Jazz on WRVR*, 775 F.2d at 394.

[13] *Id*.

[14] *Id.* at 395.

[15] *Id.* (explaining that the relevant factual question was whether the party had an intent to mislead the Commission rather than the specific facts of who said what to whom when).

[16] *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) (quoting *Gencom*, 832 F.2d at 181) (citations omitted).

Further, "a negative resolution of the second question alone makes the first question moot."[17] Thus, if the Commission finds based on the entire record that there is not a substantial and material question of fact, it does not ever need to analyze the first step.[18]

EarthLink's petition to deny fails to satisfy the first prong of this standard. Not only is EarthLink's petition filled with "general allegations"[19] and supported by an affidavit based heavily on "second-hand information,"[20] but EarthLink's petition suffers from serious logical gaps, which render it impossible for EarthLink to make out a prima facie case against the merger. EarthLink claims that, after the merger, SBC will have the incentive and ability selectively to degrade the transmissions of its retail competitors. EarthLink never explains, however, how these concerns are related to the merger – as we discussed above, SBC is already a vertically integrated supplier of Internet Backbone and retail ISP services. EarthLink's petition also claims that the merger will result in SBC de-peering EarthLink, but the only "evidence" that EarthLink offers to support this claim is its experiences with other mergers, which, as we discuss above, only go to show that de-peering easily can be the competitive outcome.

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[17] *Citizens for Jazz*, 775 F.2d at 396.

[18] *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1410 (D.C. Cir. 1996) (recognizing that Commission typically conducts the two-step analysis concurrently in the same opinion and does not err by concluding that there is no substantial question of fact in dispute without analyzing whether the petitioner has made a prima facie case that the public interest would not be served by grant of the application); *see also WorldCom/MCI*, ¶ 205 (finding initially that a number of issues raised in the record do not reflect disputes over material facts and thus do not require a hearing based on the totality of the record) (quoting *SBC v. FCC*, 56 F.3d at 1497); *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd. 14712 ¶ 579 (1999) (finding same) ("*SBC/Ameritech*").

[19] For example, EarthLink provides no support for the economic analysis that pervades its arguments, apart from the testimony of Mr. Collins, an engineer.

[20] For example, Mr. Collins asserts that SBC intends to de-peer EarthLink – something about which he has no first hand knowledge – and he offers no evidence for his claim other than EarthLink's experiences in transactions involving third parties that EarthLink considers not to be comparable to the SBC or AT&T. Collins Declaration ¶¶ 17-19. Mr. Collins also asserts that the merged company intends to change its peering relationship with other Tier 1 IBPs – again, something about which Mr. Collins has no first-hand knowledge – and he offers no evidence in support of his claim. Colllins Declaration ¶ 20. Similarly, Mr. Collins asserts, without any further evidence, that he "expects" that some 50% of all calls to be routed IP-to-IP in two years' time, but provides the Commission with no basis for evaluating the reasonableness of that expectation, which in any event is at odds with third party observations on the issue. Collins Declaration ¶ 11.

Even if the Commission were to conclude that EarthLink's illogical and unsupported accusations made out a prima facie case for denial of the transfer applications, EarthLink's petition would fail the second prong of the standard for designating an application for hearing. Based on the totality of the evidence in the record, EarthLink has not presented a substantial and material question of fact to warrant a hearing. The voluminous record is more than sufficient for the Commission to determine, without conducting an evidentiary hearing, that the merger applications serve the public interest.[21] The Applicants have submitted their Public Interest Statement; their Joint Opposition; their Narrative Responses, exhibits thereto, and documents; two declarations of Dr. Marius Schwartz; and numerous *ex parte* presentations rebutting in detail the allegations made by EarthLink and others. After weighing all the evidence before it, the Commission cannot reasonably find any substantial and material question of fact on the Internet Backbone and ISP issues that merits a hearing.

Indeed, a number of issues raised by EarthLink do not reflect disputes about material facts, "but rather, focus on the relevance of particular facts in [the Commission's] public interest determination."[22] The "legal and economic conclusions concerning market structure, competitive effect, and public interest," which EarthLink advances provide no basis for an evidentiary hearing.[23] As the Commission and the D.C. Circuit have repeatedly recognized, issues such as these "'manifestly do not' require a live hearing."[24]

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In sum, as the Commission and courts have held in numerous other cases, "an evidentiary hearing would less promote reasoned decisionmaking in this case than it would delay and impede" the Commission's decision.[25] EarthLink offers neither evidence nor argument that demonstrates that the SBC/AT&T merger raises any competitive concerns regarding either Internet Backbone or ISP services. To the contrary, the record in this proceeding conclusively establishes that the proposed combination of SBC and AT&T will not adversely affect these

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[21] *WorldCom/MCI*, ¶ 205; *SBC/Ameritech*, ¶ 581; *SBC*, 56 F.3d at 1497.

[22] *SBC/SNET*, ¶ 47.

[23] *See United States v. FCC*, 652 F.2d at 96-97 & n.82.

[24] *WorldCom/MCI*, ¶ 205 (quoting *SBC*, 56 F.3d at 1496-97); *SBC/Ameritech*, ¶ 579; *Bell Atlantic/GTE*, ¶ 438; *SBC/SNET*, ¶ 47; *United States v. FCC*, 652 F.2d at 89-90.

[25] *United States v. FCC*, 652 F.2d at 96; *see also SBC*, 56 F.3d at 1497 (quoting *United States. v. FCC*); *SBC/Ameritech*, ¶ 578 (same).

vigorously competitive businesses. Accordingly, the Commission should deny EarthLink's request for an evidentiary hearing, and grant the SBC/AT&T merger applications.

Sincerely,

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