

September 12, 2005

Ex Parte

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

Re: Applications for Consent to Transfer Control of Filed by Verizon Communications, Inc. and MCI, Inc., WC Docket No. 05-75

Dear Ms. Dortch:

In its latest filing in this proceeding, EarthLink once again claims that the combination of the companies' Internet backbones and broadband access facilities will give Verizon/MCI the incentive and ability to discriminate against retail competitors.^{1/} EarthLink has now abandoned a number of the arguments it made previously (e.g., the suggestion that the Commission should create a new "end-to-end Internet connectivity" product market) and tries a new tack: it claims that the Commission should hold an evidentiary hearing to decide what it asserts are important factual questions "about how the networks function." But EarthLink's attempt to interject these "factual issues" cannot obscure the fact that the transaction will not give the combined company market power in either the Internet backbone business or the market for broadband access services. And, absent such market power, how networks function is not a material question in this proceeding. In any event, the record makes clear how the networks function in all relevant respects. At bottom, although, as discussed below, EarthLink is wrong to dismiss the technical and practical obstacles that would exist to the types of discriminatory actions it hypothesizes, EarthLink's argument founders on more basic economic facts about which there is no significant evidentiary dispute. Accordingly, the Commission should reject EarthLink's call for an evidentiary hearing.

As we demonstrated in response to EarthLink's previous filing, it would be contrary to the combined company's economic interests to discriminate against other backbone providers or unaffiliated application or service providers by refusing to interconnect with another backbone or by degrading traffic. In particular, such a strategy would not make sense as a business matter because it would cause the combined company to lose backbone and/or retail broadband customers. Because the combined company will carry less than 10% of North American Internet traffic – and even less would be entirely "on-net" – any strategy that cut off other backbone providers would deprive Verizon/MCI's customers of the ability to reach the large majority of Internet traffic and customers and cause Verizon/MCI to lose customers to competing backbone operators, most of whose traffic would be unaffected. *See, e.g., See Letter from Dee May, Verizon and Curtis Groves, MCI to Marlene Dortch, Secretary, FCC, WC Docket No. 05-75, at 4-7 (Aug. 8, 2005) ("First Response to EarthLink"); Reply at 69-82.* Similarly, if the combined

^{1/} *See Letter from John W. Butler, Counsel for EarthLink to Marlene Dortch, Secretary, FCC, WC Docket No. 05-75 (Aug. 26, 2005).*

company degraded the traffic of unaffiliated content and application providers, such as VoIP providers, then it would harm its own end users that were attempting to use the services or applications in question, and thereby create an incentive for them to switch to another broadband access provider (such as cable modem service) that did not degrade or cut off such services and applications. *See, e.g., First Response to EarthLink* at 7-12; Reply at 82-86.

“Targeted” Degradation. EarthLink now essentially concedes (at 6) that the combined company would not actually cut off other backbones and asserts instead that the “more likely” form of discrimination would be degradation of traffic from retail competitors. Even with respect to such degradation, EarthLink does not contest that Verizon/MCI’s customers who received degraded traffic have competitive alternatives to which they could and would switch to obtain better service quality.^{2/} Instead, EarthLink claims (at 6-8) that the combined company could engage in what it terms “random” and “episodic” degradation of incoming traffic originated within Verizon’s service territories from selected application or service providers, and that such “targeted” degradation would not be sufficiently noticeable to Verizon/MCI’s customers to prompt them to leave. However, EarthLink cannot have it both ways. On the one hand, it claims (Collins Decl. ¶ 7) that random and episodic degradation would be particularly “vexing” to competitors’ customers and that “customers typically blame their service provider for any network problems.” But it then turns around and asserts (at 6-7) that Verizon/MCI’s customers would be “likely to assume that the problem is not with his or her service.” That makes no sense: Verizon/MCI would have to degrade connections with numerous competitors on a regular and substantial basis to cause any meaningful shift in customers, and the resulting shift would be away from Verizon/MCI because only its customers would be affected on a regular and substantial basis. Moreover, as described further below, even if it could be done, implementing any such strategy would require additional processing and packet inspection that would slow and degrade the performance of Verizon/MCI’s backbone as a whole and thus would not affect only the targeted traffic but would reduce service quality more generally. Thus, EarthLink’s speculative targeted degradation strategy would make no economic sense.

Further, as we have previously noted, if Verizon/MCI were to attempt a scheme along the lines that EarthLink hypothesizes, it would only be effective if the blocking or degradation were severe enough to be apparent to customers and to service providers, in which case those providers and customers would not only switch to competing backbones but would also quickly complain to lawmakers, regulators and antitrust authorities. And the Commission already has demonstrated that it can and will move quickly to stop such discriminatory practices in response to such complaints.^{3/} EarthLink asserts (at 8-9) that the situation here somehow would be

^{2/} In a footnote, EarthLink suggests (at 7 n.29) that Verizon/MCI have provided data concerning cable modem competition from only four MSAs in California. However, Verizon/MCI pointed to those four MSAs in their letter because EarthLink’s own filing had asserted (without any support) that competition for broadband access services somehow was lacking in California, and more than 90% of Verizon’s lines in California are in those MSAs. In point of fact, as Verizon/MCI also noted in their letter, the Application provided data concerning cable modem competition for the top 50 MSAs in which Verizon provides service. *See EarthLink Response* at 9; Hassett Decl. Exhibit 3.

^{3/} *See Order, Madison River Communications, LLC and affiliated companies*, File No. EB-05-IH-0110, DA 05-543 (rel. March 3, 2005) (consent order stopping telephone company from interfering with service of independent VoIP provider).

different because under the scheme it conjectures, the degradation would occur on the backbone as opposed to on the last-mile. But EarthLink does not explain why that makes a relevant difference. Customers of the provider whose traffic was being degraded would still have to notice the problem for the tactic to be effective, and they (and their provider) undoubtedly would raise the issue with the relevant authorities. Moreover, the Commission's recent statement that it would take into account "net freedom" principles^{4/} did not suggest it would overlook discriminatory action depending on *where* on the network it occurred. Indeed, the Commission's principles state that they apply to, and seek to promote competition among, "network providers, application and service providers, and content providers."

In addition to the economic and regulatory reasons that the transaction would not lead to the type of degradation that EarthLink posits, as we have explained, it would also be impractical from a technical standpoint. See *First Response to EarthLink* at 10-11. EarthLink's claim (at 7-8) that MCI/Verizon's network is already capable of engaging in this practice is incorrect and confuses two different issues. In particular, EarthLink asserts that MCI/Verizon must be capable of identifying the source of incoming traffic in order to implement their peering policies. But for purposes of peering, Verizon/MCI need only identify the *backbone* from which the traffic is originating. By contrast, EarthLink's "targeted degradation" strategy assumes that Verizon/MCI would be able to identify the underlying retail provider (i.e., the backbone operator's *customer*), as well as other characteristics such as the type of traffic (e.g., whether it was VoIP) and the geographic location from which it originated (in-region vs. out of region). The routers deployed at peering points are not capable of engaging in this type of detailed packet inspection and matching of IP addresses with particular sources; rather, they are designed to determine the destination of the incoming packet and route them as quickly as possible. Even if Verizon/MCI could deploy new software and hardware to engage in such a practice, the detailed inspection and processing of *all* packets flowing through Verizon/MCI's network needed to pick out the ones with the targeted characteristics would significantly slow and degrade the performance of the network as a whole.

Further, as Verizon/MCI have noted, a degradation strategy would require it to deploy staff resources and develop processes, provisioning guidelines, and routing tables that would need to be managed across the entire network. *First Response to EarthLink* at 10. EarthLink's only response (at 8) is to claim that Verizon/MCI would only have to do so within their service territories where they stand to lose retail customers. But even if that were the case, that would still require a large investment of resources. Moreover, traffic from other backbones could be handed off to Verizon/MCI at virtually any peering point in its network even if it was destined for a customer within Verizon/MCI's service territories and thus it might well be necessary to deploy these resources across the network as a whole.^{5/} Finally, as Verizon/MCI have noted, the targets of degradation could employ a variety of technical strategies to defeat

^{4/} FCC News Release, *New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet* (Aug. 5, 2005).

^{5/} This is especially true given the use of hot potato routing. Traffic originating on a peer network outside of Verizon territory would be handed off to Verizon/MCI at the nearest possible exchange point, which would likely be outside of Verizon territory. Thus, a discrimination scheme such as the one hypothesized by EarthLink likely would require extensive upgrades to equipment throughout the Verizon/MCI network, not just to in-region equipment.

attempts at degradation. *First Response to EarthLink* at 10. Although EarthLink suggests that this would be difficult because one network cannot “identify the internal settings of another network,” that is equally true of spammers today, who nevertheless often circumvent attempts to block or degrade their traffic.

Finally, with respect to VoIP traffic in particular, EarthLink’s speculation that the transaction would increase the ability and incentive for the combined company to engage in degradation assumes that VoIP traffic will be handed off through Internet peering relationships rather than being terminated over the PSTN. In responding to arguments made by SBC/AT&T, EarthLink concedes that the combined companies could not engage in such degradation to the extent that VoIP traffic terminated over the PSTN, but asserts (at 3-7) that the “vast majority of VoIP calls” will be routed using backbone-to-backbone connections “in the very near future.” But EarthLink’s assertion has no basis. Its reliance (at 5) on statements by Verizon indicating that it is moving to packet-switching technology says nothing about whether VoIP calls will be terminated using the Internet backbone, since packet-switching technologies can also be used at various interconnection points to the PSTN. Indeed, the statements to which EarthLink points were made *before* the merger agreement and so by definition had nothing to do with using MCI’s backbone to route or terminate VoIP traffic. The reality is that the industry has not yet determined the best means for interconnection specifically for VoIP traffic. Indeed, various industry groups and standards bodies such as the Internet Engineering Task Force and IP Sphere are engaged in discussions concerning the standards, protocols, and business rules for IP-IP interconnection of VoIP services, and it is not clear what method, if any, will become standard or whether it will involve Internet backbone-to-backbone handoffs. In any case, given that these issues are still being discussed, there is no basis for EarthLink’s assertion that the “vast majority” of VoIP traffic will be routed using backbone-to-backbone connections “in the very near future.”

De-Peering. EarthLink also asserts (at 10-11) that the transaction will enable the company to “de-peer” its retail competitors or their backbone operators. To the extent that EarthLink is suggesting that the combined company would *disconnect* another backbone provider, as noted above, we have previously explained why that would not make any economic sense and would significantly harm Verizon/MCI’s own customers. *See First Response to EarthLink* at 4-7. To the extent that EarthLink is referring to the difference between peering and transit, Verizon/MCI have not suggested, as EarthLink asserts (at 10), that they would be “unable” to de-peer other networks following the transaction. To the contrary, as we have explained, the question whether to enter into a peering or transit relationship depends on a variety of economic and other factors, and such relationships evolve over time in response to changes in traffic flows, the relative geographic scope of the networks, and similar attributes.^{6/} *See, e.g.,* Reply at 75-81. The transaction will not alter that: Verizon/MCI will continue to make peering decisions based on the relevant economic and technical criteria. As we have explained,

^{6/} EarthLink’s admission (Collins Decl. ¶ 19) that it has been de-peered by several providers, including Aleron/Cogent, is telling. EarthLink does not argue that Aleron/Cogent, or any of the other providers, have market power, much less that such market power arises from alleged control of local access. Thus, EarthLink’s recitation merely serves to reinforce the fact that de-peering is a natural occurrence in the dynamic Internet backbone business. Peering is a form of bartering and when the traffic exchanged between two peers falls out of balance or some other relevant factor changes, the companies must reassess their relative positions (by, for example, moving from a peering relationship to a transit arrangement).

because the transaction will not materially alter the status quo in terms of the Internet backbone business and the combined company will remain fourth among seven comparable or larger backbone operators, it will not have market power in the backbone business, and it will have no incentive to make anticompetitive peering decisions. *See, e.g., First Response to EarthLink* at 4-7.

As we have also noted, a variety of competitive trends have further reduced the ability of any one backbone operator to obtain and exercise market power. *See, e.g., Kende Reply Decl.* ¶¶ 18-29. Among these, is the increased ability of customers to change backbones through, for example, the use of multi-homing and the growth of Internet Exchange Points at which numerous customers and backbone operators interconnect. *See id.* EarthLink does not address these various developments, but claims (at 11) that it in particular would incur substantial costs to switch backbone operators. But even if EarthLink has not taken advantage of these technological and market developments, that does not alter the fact that they have occurred and that they further undermine the ability of the combined company or any other backbone provider to accumulate and exercise market power.

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In sum, EarthLink's latest stratagem of calling for an evidentiary hearing has no more basis than its earlier arguments. The Commission need not resolve factual issues about "how networks operate." Rather, the record clearly establishes that this transaction will not have harmful horizontal or vertical effects on competition for Internet services.

Sincerely,



Dee May
Verizon



Curtis Groves
MCI

cc: Julie Veach
William Dever
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