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Lampert & O'Connor, P.C.
1750 K Street NW
Suite 600
Washington, DC 20006

Donna N. Lampert
lampert@l-olaw.com

Tel 202/887-6230
Fax 202/887-6231

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September 12, 2005

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Federal Communications Commission
Office of Secretary

Via Hand Delivery

Ms. Marlene Dortch, Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, SW
Washington, DC 20554

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Re: Notice of *Ex Parte* Presentation – WC Dkt No. 05-65, *In the Matter of SBC/AT&T Applications for Approval of Transfer of Control*; WC Dkt No. 05-75, *In the Matter of Verizon/MCI Applications for Approval of Transfer of Control*

Dear Ms. Dortch:

On September 9, 2005, Christopher Putala of EarthLink, Inc., and the undersigned met with Jim Bird, C. Anthony Bush, and Karen Onyeije, of the Office of General Counsel; Gail Cohen, Bill Dever and Marcus Maher of the Wireline Competition Bureau; and Donald Stockdale of the Office of Strategic Planning & Policy Analysis regarding the above captioned proceedings. EarthLink reviewed its role in the communications marketplace, the potential harms to the public interest as a result of the proposed mergers and suggested conditions to remedy such harms to ensure that consumers benefit from innovative, reliable and competitive communications services.

Specifically, EarthLink described its interest in the proposed mergers insofar as it competes with and/or utilizes the services of the companies involved in the proposed transactions. EarthLink detailed its service offerings and ongoing deployments, including retail Internet access, broadband Internet access, VoIP and other IP-enabled services, including facilities-based offerings. EarthLink explained that to offer these services, it relies, directly or indirectly, on the wholesale broadband offerings of the merging companies and stressed that MCI and AT&T represent the two largest actual and most viable potential competitors for these services in the SBC and Verizon regions. EarthLink further described its relationships with these companies, including its experience negotiating contractual arrangements for wholesale broadband and other special access services, and noted that in addition to the BOC in-region offerings of services, MCI offers a wholesale broadband service, Private Label DSL Internet, as described on its public web site (Attachment 1). EarthLink noted that both MCI and AT&T are well-positioned to offer competitive alternatives to the BOCs, whether because of previous acquisitions (*e.g.*, Rhythms and NorthPoint, respectively, both competitive data providers) or

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announced strategic business objectives. EarthLink stated that clear and consistent FCC precedent in reviewing merger impacts on the public interest requires a consideration not only of actual competition but the effect on future competition of the transactions in question. As such, EarthLink explained that the diminution in competition for wholesale broadband services as a result of the proposed mergers, especially as EarthLink seeks to negotiate contractual arrangements to effectuate the FCC's recent decision in its *Wireline Broadband* proceeding (CC Dkt. 02-33), will adversely impact the public interest.

In light of the significant public interest harms that will be caused by the proposed mergers, EarthLink discussed several possible remedies and conditions to ensure the broad public interest is served. As an initial matter, EarthLink proposed that the FCC condition the mergers on the availability of a stand-alone DSL service to ameliorate the decrease in competition in the voice and data services arenas as a result of the exit of MCI and AT&T from the market. Such a stand-alone DSL requirement should be offered at both retail and wholesale and should include a price imputation obligation to help ensure that the offerings do not allow anticompetitive abuses, including price squeeze. EarthLink also noted that with respect to a retail stand-alone DSL offering, in delineating the requirement, the FCC should clarify that the merged companies must accept consumers' Letters of Authorization to allow such services to be ordered on their behalf.

EarthLink also stressed the importance of effective and swift enforcement for all proposed merger conditions including: an expedited dispute resolution process for merger condition violations with "injunctive relief" so that the public interest harm from violations is remedied as soon as possible; pre-established damage estimates (liquidated damages) for specific violations (*e.g.*, denial, delay, OSS, technical, etc.) paid to aggrieved parties (in addition to substantial FCC fines); an enforcement process whereby, upon allegations of violation, burden shifts to the defendant to demonstrate compliance; and a requirement that parties to any merger condition compliance dispute negotiate, with an arbitrator selecting between two last best offers submitted by parties in specified timeframe ("last offer arbitration"). In addition, to ensure compliance, EarthLink urged the FCC to require: company compliance programs by the merged entities, including compliance officer/oversight and quarterly reports describing all requests for services and resolution; performance metrics for services including time periods for pre-order, provisioning, trouble ticket, etc. along with quarterly performance reports; and an annual independent audit at company expense.

Further, EarthLink underscored the importance of conditioning the mergers on obligations designed to decrease the opportunity for the merged companies to engage in discriminatory conduct, including preferences to affiliated service providers, traffic interference or degradation and blocking. In light of the elimination of the two most likely alternative competitive suppliers of broadband services, and the substantial leverage these departures will have on the contract negotiation process between EarthLink and the merged entities, it is especially important for the FCC to decrease the likelihood of such anticompetitive abuses. EarthLink stressed that such discrimination is not hypothetical but has occurred in the past and can unquestionably occur in the future, especially given the ongoing incentive and increased opportunity for such conduct. As such, EarthLink requested that the FCC also condition the proposed mergers on requiring nondiscriminatory (non-preferential) access to Internet sites, content, and applications to forbid expressly the merged companies from prioritizing their own traffic or from interfering with traffic transmitted over their networks (including blocking and degradation).

EarthLink further explained that the FCC should require a showing of new, long term (*e.g.*, three-five years) contractual arrangements with any wholesale broadband customer that is today currently served as well as a requirement that there be no unilateral termination or material alteration of any rates, terms and conditions of existing offerings for two years. In light of its reliance upon vendors that utilize the special access services of the merging parties as well as its direct purchases, EarthLink also endorsed the suggestions of other parties to condition the mergers upon safeguards designed to ensure no adverse public interest harms to existing special access services, including the adoption of a "fresh look" opportunity; a "freeze" such that there can be no unilateral termination or material alteration of any rates, terms and conditions of existing offerings for two years, including peering and transit agreements; and related performance metrics and reporting and compliance oversight.

Pursuant to the Commission's rules, please find two copies of this filing for inclusion in the public record of the above-referenced dockets. Please do not hesitate to contact me directly if you have any questions.

Respectfully submitted,

Donna N. Lampert
Counsel for EarthLink, Inc.

cc: (*via electronic mail*)

Jim Bird (Jim.Bird@fcc.gov)
C. Anthony Bush (Clarence.Bush@fcc.gov)
Karen Onyeije (Karen.Onyeije@fcc.gov)
Gail Cohen (Gail.Cohen@fcc.gov)
Bill Dever (William.Dever@fcc.gov)
Marcus Maher (Marcus.Maher@fcc.gov)
Donald Stockdale (Donald.Stockdale@fcc.gov)

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Internet

MCI provides a comprehensive range of Internet Services to business customers worldwide. Utilizing the fastest, most rigorously engineered, and most reliable TCP/IP network in the world, MCI delivers superior Internet Services to thousands of cities throughout North America, South America, Europe and Asia Pacific.

Dedicated Internet Access

- Dedicated Internet Access gives you a direct connection to one of our networks' transit hubs. A choice of line capacities is available to match your bandwidth requirements and growth rate up to 622 Mbps (OC12c).
- Burstable Select supports Dedicated Internet DS3, OC3, OC12, OC48, GigE services and Internet Dedicated Ethernet (IDE - Burstable Select 10M, 50M, 100M, and 600M) with billing in 1 megabit increments for usage above selected Bandwidth Commitment.
- Price Protected DS1/DS3/OC3c/OC12c provides up to 622 Mbps (OC12c) of bandwidth, but you pay a fixed monthly cost. This makes budgeting easier, even if you have frequent bursts in traffic.
- Double/Diverse DS1/DS3/OC3c/OC12c provides "load share" bandwidth. Double provides Internet access from the same network hub, whereas Diverse uses two different hubs.
- Shadow DS1/DS3/OC3c/OC12c is a dependable, redundant solution for mission-critical Internet applications. Using BGP4 routing, traffic is automatically and seamlessly rerouted to a secondary connection in the event of an outage on the primary circuit.
- Tiered DS3/OC3c/OC12c is offered in multiple billing tiers, with usage capped at the service level you choose. Monthly prices are based on the port speed chosen, so you can budget based on a fixed monthly cost.
- 768K is a scaled-down T1 service designed to meet the needs of entry-level customers, providing 768 Kbps of Internet access at a fixed discounted rate, which allows customers to lock in their Internet access cost over a period of time.

MAE Services

MAE Services is designed for Internet Service Providers (ISPs) who require high speed connections with other ISPs to exchange Internet traffic. MAE Services offers one of two types of technologies, Asynchronous Transfer Mode (ATM) or Frame Encapsulation (FE).

Internet Access Via Frame Relay Transport

Internet Access via Frame Relay Transport allows up to 1.536 Mbps of Internet traffic to be transported over a single DS1. By combining this with the Integrated DS1 Access product, you can add services, such as 1+, Toll Free, Frame Relay, or Private Line Services to that local loop, and significantly reduce DS1 access recurring and installation charges.

Private Label DSL Internet

Private Label DSL Internet is a cost saving alternative to dedicated access. This solution offers large enterprises and Internet Service Providers (ISPs) the ability to "brand" Internet service as their own. This product can be used internally or as a resale service.

Dial-Up Internet Access

VIP Dial Access gives end users access to the world's largest Dial Access Network (DAN) with 3,800 POPs worldwide. Our dial access network offers V.90.56 Kbps modem access and ISDN connectivity, as well as 800 access.

Value-Added Services

- Preconfigured customer premises equipment
- IP addressing
- Domain name registration
- DNS service
- SMTP e-mail relay and NNTP newsfeed service