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October 3, 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:

SBC/AT&T's September 8, 2005, filing and Verizon/MCI's September 12, 2005, filing, represent another attempt by both sets of Applicants to gloss over crucial facts, misstate an opponent's merger concerns, and ask the Commission to ignore critical issues in this proceeding. Despite the fact that EarthLink has highlighted several substantial and material questions of fact that have arisen from the parties' exchanges, and has identified specific factual questions that are essential to the Commission's review of the competitive impact of this merger, both Applicants continue to use vague rhetoric and rely on unsupported allegations to support their Applications. As EarthLink demonstrates below, the Applicants' filings only strengthen EarthLink's argument that this merger will give the merged companies the ability and the incentive to selectively target and degrade the services of their retail competitors.

Perhaps even more important than what the Applicants have said is what they have not said. *First*, in its August 26, 2005, letter, EarthLink addressed in detail how the merged companies will gain the technical ability to selectively degrade the transmissions of their in-region retail competitors. In his declaration, Greg Collins recounted at length, using first-hand knowledge of network functionality, the mechanisms that the merged companies will acquire to discriminate against their competitors' Internet and voice traffic. At no point have either of the Applicants contested the merged companies' technical ability to use their networks to discriminate against their competitors' transmissions or the fact that it would be extremely difficult to detect and prevent the

source of such targeted service degradation.[1] *Second*, it is uncontested that the global backbones that SBC and Verizon will acquire—over which an increasing amount of VoIP and Internet access traffic will travel in the very near future—have *never* been regulated by the Commission. The Applicants have not disputed EarthLink's merger-specific argument that the acquisition of AT&T and MCI's Internet backbones will give the merged companies a second place—in addition to the last-mile—where they can discriminate while avoiding detection and regulation.[2] *Third*, at no point have the Applicants contested the fact that SBC and Verizon are the dominant providers of both voice and Internet-based services in their respective territories.[3] Although Verizon/MCI again attempts to argue that Verizon lacks national market power in the "broadband access service" market,[4] the Applicants correctly do not contest that fact that Verizon does have market power in the last mile markets for voice and Internet-based transmissions within its territory. As Mr. Collins addressed in detail in his declaration, SBC and Verizon's control over the vast majority of analog end user lines as well as a substantial number of broadband end user lines in their respective territories, coupled with their acquisition of AT&T and MCI's unregulated backbones, will allow the merged companies to pursue a strategy of selective degradation against their competitors with little or no relative harm to their own service.

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[1] Although Verizon/MCI concedes that the merged company would be technically able to discriminate against its competitors' transmissions, it once again asserts that such ability would require the deployment of new "hardware and software" capable of identifying traffic. *See* Verizon/MCI Letter, Sept. 12, 2005, at 3. EarthLink has already rebutted this argument and supported its statements with sworn testimony from Greg Collins, EarthLink's Director of Network Engineering and Operation. Mr. Collins stated that every network is already configured to identify the source, destination, and protocol of incoming traffic, and therefore any selective degradation scheme is entirely possible using existing network components. *See* Collins Dec. at ¶¶ 5, 8. The only attempt Verizon/MCI has made to rebut Mr. Collins' expert testimony is through unsworn allegations of lawyers who do not purport to have any understanding of how the networks operate. The statute provides that the Applicants can respond to disputed issues of material fact, but such a response "shall similarly be supported by affidavit." 47 U.S.C. § 309(d)(1). Thus, the Applicants' burden of proof is clear: it requires far more than the unsworn, unsupported statements by counsel.

[2] In a perfect example of how the Applicants have chosen to simply ignore the arguments of their opponents, Verizon/MCI claims that EarthLink does not explain why the fact that targeted service degradation would occur on the backbone as opposed to on the last-mile "makes a relevant difference." Verizon/MCI Letter at 3. In fact, EarthLink has now stated several times that because the global backbones that SBC and Verizon will acquire have *never* been regulated by the Commission, the backbones give the merged companies a second place—in addition to the last-mile—where they can discriminate while avoiding detection and regulation. *See* EarthLink August 26, 2005 Letter at 9. For this reason, EarthLink has already sufficiently rebutted Verizon/MCI's repeated attempt to suggest that the Commission can "move quickly to stop such discriminatory practices." *See* Verizon/MCI Letter at 2.

[3] With regard to Internet-based services, in its July 26, 2005, filing, SBC/AT&T stated that it did not control dial-up Internet end users. In its August 26, 2005, letter, EarthLink responded to the Applicants that the extent of SBC's control over such traffic was dependent on whether the ISP that serves the dial-up end user is a "Layer 2" or "Layer 3" customer of the BOC. The combination of Layer 3 service with the Applicants' ownership and control of the Internet backbone gives the merged company a substantially increased ability to discriminate. The Applicants did not respond to this point in their most recent filing, and must on this record be deemed to have conceded the point.

[4] Verizon/MCI Letter at 1.

On the basis of these uncontested facts, the record today supports the conclusion that the mergers will have a substantial anticompetitive effect with respect to Internet-based services—services that increasingly comprise the core of the nation's telecommunications system. On that record, the Commission must either: (1) deny the Applications, (2) set the issues identified in EarthLink's August 26, 2005, filing for formal hearings, or (3) accept the facts as proven by EarthLink and condition its approval of the Applications on adoption of conditions that address the public interest harms that will be caused by the mergers. Although the Applicants' admissions are sufficient by themselves to require that the Commission take one of the steps outlined above, in the interest of completeness EarthLink addresses below in detail the Applicants' latest set of erroneous and unsupported arguments regarding the merged companies' ability to discriminate against their competitors post-merger.

1. The Records Support the Conclusion that the Applicants Will Have the Incentive and the Ability to Selectively Degrade the Transmissions of Their Competitors.

a. SBC's Current Backbone is Insufficient For the Company to be Considered Vertically Integrated Today.

SBC/AT&T claims that EarthLink's selective degradation concerns are not merger-specific because SBC is already a "vertically integrated supplier of Internet Backbone services, as well as retail ISP services."[5] This argument simply ignores the vast differences in traffic capacity, geographic reach, and peering status between SBC's current backbone and the AT&T backbone that it intends to acquire. According to the Applicants' own Public Interest Statement, "SBC is one of the many new smaller entrants in [the Internet backbone] business, and does not control a significant share of traffic or revenue."[6] SBC currently uses a number of Tier 1 Internet backbones to carry its traffic,[7] but plans to shift all that traffic to its own backbone (i.e., AT&T's backbone) as soon as the merger is consummated. The simple point is that SBC's "backbone" is in all material respects a very different asset than AT&T's backbone. The Applicants themselves admit that "neither SBC nor AT&T standing alone has the assets and expertise to assemble a true nationwide end-to-end broadband network."[8] Thus, the Applicants' response that SBC is already vertically integrated can be answered with one simple question: if SBC already possesses sufficient last-mile *and* Internet backbone assets, then why is it acquiring AT&T? The Applicants have already answered this question:

> SBC lacks the extensive backbone network necessary to efficiently interconnect all of its content sources and subscribers. AT&T, on the

[5] SBC/AT&T Letter, Sept. 8, 2005, at 1.

[6] SBC/AT&T Public Interest Statement at iii.

[7] *See* Response of SBC to Information and Document Request at C.8.b.3.

[8] SBC/AT&T Public Interest Statement at iii.

> other hand, has the backbone capabilities but lacks the broad local access facilities. The combined assets will create a seamless, high quality and cost-effective end-to-end IP network for next-generation applications.[9]

The Applicants simply cannot have it both ways. Either SBC already has a substantial backbone comparable in size or scope to AT&T's backbone, which would create horizontal merger concerns, or its pre-merger backbone is not substantial enough for the company to be considered "vertically integrated" today in any sense that would affect the merger analysis. Indeed, the whole purpose and effect of this merger is that "SBC's and AT&T's separate networks will be transformed into a unified IP-based network,"[10] which requires a complete "transformation of the backbone."[11] It is the addition of AT&T's global backbone to SBC's substantial last-mile assets that will provide the merged company with the incentive and ability to discriminate against its retail competitors. For this reason, the Commission should recognize the Applicants' "merger-specific" argument for what it is: just another attempt to duck an issue and avoid answering a critical question in this proceeding.

b. SBC/AT&T and Verizon/MCI Would Suffer Very Little Harm to Their Own Networks By Selectively Degrading Traffic Initiated By Other Service Providers.

SBC/AT&T claims that EarthLink's targeted degradation concerns fail to rebut Dr. Schwartz's statement that so long as both EarthLink and SBC customers would suffer some reduction in service quality, a degradation scheme would not be profitable. Not only has EarthLink rebutted this claim several times already, but this argument simply underscores the inadequacy of the Applicants' own position. First, as Mr. Collins stated in his declaration:

> [T]he merged companies would be able to harm the incoming traffic of one its targeted competitors (once that traffic hits the merged companies' backbones) without degrading its own outgoing traffic at all. Moreover, if the merged companies pursued a strategy of serial degradation, targeting one or two competitors at a time (depending on size), the relative degradation of service would be close to 100% for customers of the targeted retail competitor, but very infrequent for customers of the merged company. This is so because the customer of the merged company would notice a loss of service quality only when a customer of the degraded company initiated a communication. Under those circumstances, where the merged company's customer's service works except for when he or she is contacted by a customer of the degraded provider, the customer of the merged company is likely to assume that the problem is not with his or

[9] *Id.* at 43.

[10] *Id.* at 19.

[11] *Id.* at 34.

> her own service, and therefore that customer is unlikely to switch service providers. The harm therefore falls almost exclusively on the targeted company.[12]

EarthLink's argument is that the *relative* harm suffered by the merged company would be far less than that of the degraded company. Neither the Applicants nor Dr. Schwartz has even attempted to respond to this argument. Instead, the Applicants have chosen to simply misstate the argument (by *assuming* equal harm where in fact the harm is exceedingly unequal) in a manner most convenient for them.

Similarly, Verizon/MCI again argues in its recent filing that it would be "contrary to the combined company's economic interests" to discriminate against its competitors because that "would cause the combined company to lose backbone and/or retail broadband customers."[13] However, Mr. Collins' testimony above clearly indicates that the merged company would be able to degrade the transmissions of its retail competitors without any harm to its own service. A customer whose service *never* works in-region (i.e. a customer of the degraded provider) is likely to blame his own carrier for the problem. However, the customer of the merged company would notice a loss of service quality *only* when a customer of the degraded company initiated the communication. Under these circumstances, the customer of the merged company is likely to assume that the problem is not with his or her own provider, but with the other person's provider. As a result, the customer of the merged company is not likely to switch service providers. Additionally, EarthLink has also noted that both Verizon and SBC have a substantial market share of voice end user lines throughout their respective territories, making SBC and Verizon the natural place for dissatisfied customers of degraded VoIP carriers to turn for an alternative. As Mr. Collins states, "[g]iven low customer tolerance for service failures, and given that customers typically blame their service provider for network problems, a program of targeted degradation against competitors could be quite effective in moving customers away from competing providers and onto services provided by the merged companies."[14] Thus, it is quite clear that selectively degrading the service of its in-region retail competitors would in fact be very much in the combined company's "economic interests." Neither Verizon/MCI nor SBC/AT&T has offered any sworn testimony or evidence to rebut this essential point.

It is no answer for Verizon/MCI to suggest that it would only carry "10% of North American Internet traffic," and therefore any degradation strategy would cause Verizon/MCI to lose customers.[15] The percentage of North American traffic that the merged company will carry is irrelevant for purposes of determining the merged company's ability and incentive to discriminate against its competitors. The only

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[12] Collins Declaration at ¶ 13 (emphasis added).

[13] Verizon/MCI Letter at 1.

[14] Collins Declaration at ¶ 7.

[15] Verizon/MCI Letter at 1.

relevant issue is the *in-region* IP-based traffic that Verizon/MCI has already told the Commission will traverse its newly acquired backbone once the merger is approved. Once this traffic is on its backbone, Verizon/MCI will have an incentive and ability to selectively degrade the transmissions of its competitors in an undetectable manner so as to make the services of the degraded company less attractive than its own service.

c. The Records Do Not Support the Theory That the Existence of a Cable Alternative Will Deter Discrimination.

Not only has SBC/AT&T not contested SBC's position as the dominant provider of both voice and Internet-based services in its territory,[16] but the only real attempt the Applicants make to rebut EarthLink's concern is to suggest that targeted degradation would result in both providers' customers terminating their service and migrating to "a cable-based VoIP provider."[17] However, nowhere on the record do the Applicants state how many local geographic markets within the 13 states in SBC territory have competitive choices for broadband services.[18] In other words, if the merged company were to selectively degrade one if its competitor's service, where will those customers go? If one of their primary choices is SBC, it is clear that SBC will benefit from the degradation. If, as is the case for many voice and broadband customers, SBC is their *only* choice, then the benefit is that much more obvious. Moreover, at least one cable provider, Cox, has expressed the same concern as EarthLink regarding interference with transmissions.[19]

After all is said and done, EarthLink has thoroughly rebutted Dr. Schwartz's testimony regarding the relative harm caused by targeted degradation, and has supported its analysis with expert testimony showing how such a scheme is not only technically feasible, but also entirely realistic. Despite the fact that the Applicants have responded to EarthLink several times, their entire argument regarding the merged company's ability to degrade the services of its retail competitors continues to rely on a few selected sentences concerning one economist's opinion written over three months ago—sentences that simply do not address the question at issue. The Applicants have ignored the clear evidence on the record and have failed to supply any new evidence or expert testimony of their own.

Verizon/MCI again suggests that its Application has provided sufficient data concerning cable modem competition for the top 50 MSAs in which Verizon provides

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[16] The Applicants cite to the UK Competition Commission for the proposition that AT&T is not a dominant network in the United Kingdom. *See* SBC/AT&T Letter at 2, n. 3. That may be so, but it is irrelevant, because there is no question that SBC is a dominant last-mile provider of voice and DSL services in its territory.

[17] *Id.* at 2.

[18] This is one of the primary reasons why EarthLink has requested an evidentiary hearing, and asked that this specific issue be addressed. *See* EarthLink Letter, Aug. 26, 2005, at 15.

[19] *See* Cox Letter, Aug. 15, 2005, at 4.

service.[20] The information contained in Mr. Hassett's Declaration was obtained from the Warren Communication's *Cable FactBook*.[21] This information, without more, does not provide the factual basis for the Applicants' claim that cable alternatives exist in these MSAs. How and when was this data collected? To what extent is this data compiled by Warren Communications or Verizon/MCI? In either case, has a local market analysis been conducted on any basis other than counting *any* presence by a carrier in a given zip code as constituting service by that carrier *throughout* that entire zip code? The simple fact is that the Applicants' data does not answer the question of how many subscribers in Verizon's 29-state territory have alternative providers. Thus, EarthLink reiterates that, for purposes of a meaningful competitive analysis, the Applicants have only begun to scratch the surface.

d. The Records Reflect That Substantial and Material Questions Of Fact Remain Regarding the Functionality of the Networks.

SBC/AT&T suggests there is no need for an evidentiary hearing concerning the factual disputes between EarthLink and the Applicants regarding VoIP functionality because: (1) Mr. Collins' declaration offers no more than "tautology" regarding when the majority of calls will be routed using IP, and (2) SBC's experts have already concluded that there are "numerous hurdles that need to be overcome for Internet-Backbone-to-Internet Backbone handoffs to be commonplace."[22]

Regarding the Applicants' first point, in his capacity as Director of Network Engineering and Operations for EarthLink, Mr. Collins used first-hand knowledge of how the networks function today and how they will function after the merger when he stated that "within the next two years, I expect approximately 50% of all calls to be routed IP-to-IP."[23] He further stated that once calls are routed using IP, that traffic will by definition traverse the merged company's backbone, and the merged company will be able to selectively degrade the transmissions of its retail competitors.[24] Thus, for purposes of the merged company's ability to discriminate, the only remaining question is how long it will take for the merged company to transition its network to an all IP model. If anyone knows this information, it is the Applicants, but they have offered nothing on

[20] Verizon/MCI Letter at 2.

[21] Hassett Declaration at Ex. 3.

[22] SBC/AT&T Letter 2-3.

[23] Collins Declaration at ¶ 11.

[24] The Applicants state that a substantial amount of VoIP calls will be provisioned using the PSTN—and not backbone-to-backbone transmissions—because there will remain for many years millions of circuit-switched phone customers. SBC/AT&T Letter at 3. The number of circuit-switched customers, however, is irrelevant. As Mr. Collins stated in his declaration, "[a]lthough it may take 10-15 years for *all* consumers to switch from traditional telephone service to VoIP service, it will be much sooner for a substantial number of calls to be delivered using Internet protocol ("IP")." Collins Declaration at ¶ 11. The Applicants are silent on this issue.

the point.[25] Surely the Applicants do not believe it is sufficient to allow counsel to simply reject Mr. Collins' testimony out of hand without proffering any of their own expert testimony or evidence in response.

With respect to the Applicants' statement that their experts have already concluded that there are "numerous hurdles that need to be overcome for Internet-Backbone-to-Internet Backbone handoffs to be commonplace,"[26] the Commission should note that the Applicants have in fact cited no expert testimony to support this statement. Nor could they, because none of the Applicants' experts has addressed this topic. Dr. Schwartz's testimony focused on the horizontal effects of the proposed merger on the Internet backbone market, with particular emphasis on Internet backbone concentration and targeted and global de-peering. If indeed any of the Applicants' experts had addressed the important factual questions regarding: (1) how far along SBC and AT&T are in transitioning their networks from circuit-switched to packet-switched platforms, (2) what the merged companies' post-merger plans are for transitioning its network to an IP-based platform, and (3) what percentage of all traffic today and after the merger will be provisioned using backbone-to-backbone connections, then the Applicants should cite such testimony to support its arguments. The Applicants by statute have the burden of proof here, and by virtue of their exclusive knowledge of what the future holds for their own networks, they also have the burden of coming forth with evidence on this fundamental issue.

Although Verizon/MCI appears to be a couple of steps behind, their own arguments do support the fact that the debate between the parties' has narrowed to a set of substantial and material questions of fact. In its response, Verizon/MCI states that "the industry has not yet determined the best means for interconnection specifically for VoIP traffic."[27] Thus, while at the same time conceding the point that there are a variety of routing paths for VoIP calls today (including paths that traverse the Internet backbone),[28] Verizon/MCI attempts to dodge the issue of how long it will take for a substantial portion of VoIP transmissions to be provisioned using IP-based backbone-to-backbone connections. The Applicants assert that statements made by Verizon and MCI *before* the merger have "nothing to do with using MCI's backbone to route or terminate VoIP traffic."[29] But if this is true, then EarthLink asks Verizon the same question as it did SBC

[25] Additionally, EarthLink finds it difficult to understand how the Applicants' *own statements* regarding when their networks will be transitioned to an IP-based platform are misplaced in this proceeding. *See* SBC/AT&T Letter at 2. In fact, these statements go directly to the question of how long it will take for VoIP calls to be provisioned using backbone-to-backbone connections. Despite the Applicants' attempt to downplay the significance of their own statements, they in fact confirm Mr. Collins' prediction that the vast majority of VoIP calls will be provisioned using backbone-to-backbone connections in the very near future.

[26] *Id.* at 3.

[27] Verizon/MCI Letter at 4.

[28] *See* Collins Dec. at ¶ 10.

[29] Verizon/MCI Letter at 4.

above: why is Verizon acquiring MCI? Again, Verizon has already answered this question when it stated that "one of MCI's most valuable assets and core strengths is its extensive Internet Protocol backbone network," which is "capable of providing IP connectivity for VoIP services today and other IP-based services tomorrow."[30] Indeed, the whole purpose and effect of the merger is to transition Verizon/MCI's post-merger network to an IP platform. The only question that remains is how long it will take for that to occur, and the Applicants—like SBC/AT&T—have offered nothing on the point. It is in large part for this reason that an evidentiary hearing on these matters is so critical.

2. The Applicants Have Again Admitted That They Will De-Peer Post-Merger.

SBC/AT&T responded to EarthLink's de-peering concerns by stating that they have in fact addressed EarthLink's future peering arrangement with the merged company after the merger is approved. However, the language that the Applicants chose to quote in its latest submission plainly admits that EarthLink, and other companies in similar positions, will be de-peered after the merger. Christopher Rice, SBC's Executive Vice president, first states that "*[a]t least initially*, all peers of the SBC backbone will continue in their current arrangement."[31] In other words, at least until the "systems are integrated into a single ASN," the merged company will not de-peer any current peering partners. However, once the systems are integrated (the purpose of the merger), Mr. Rice states that "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 those companies do not, today, meet AT&T's criteria for settlement-free peering."[32] In other words, once the merged company implements its post-merger plan, it will de-peer all of its current peering partners that fail to meet AT&T's size and traffic requirements.

Given the fact that Dr. Schwartz suggested that EarthLink's de-peering concerns were unwarranted because AT&T would not de-peer on the basis of size or traffic ratio (supposedly evidenced by the fact that AT&T currently peers with "a number of companies smaller than SBC"),[33] it is telling that Mr. Rice admits that several "Tier 2 IBPs and ISPs" will fail to meet AT&T's peering criteria. As an officer of the company, Mr. Rice is presumably in a position to know what the policy will be. Thus, the Applicants' most recent response to EarthLink regarding de-peering concerns has only served to undermine their own expert's testimony and buttress EarthLink's previous argument that the only thing that emerged from Dr. Schwartz's de-peering testimony is that there is no reliable evidence on the record that suggests whom (and on what terms) the merged company will choose to peer with after the merger.[34] Indeed, on the basis of

[30] Verizon/MCI Public Interest Statement at 12.

[31] Rice Reply Dec. at ¶ 10 (emphasis added).

[32] *Id.*

[33] Schwartz Reply Dec. at ¶ 28.

[34] *See* EarthLink Response to SBC/AT&T, June 24, 2005, at 7.

their most recent response it could not be more clear that the merged company will de-peer or threaten to de-peer either its retail competitors directly, or the IBPs that their competitors rely on to deliver their services to end users.

Verizon/MCI has added nothing further to the question of whether the merged company will de-peer after the merger is approved. Verizon/MCI again suggests that peering relationships "evolve over time in response to traffic flows, the relative geographic scope of the networks, and similar attributes," and that its post-merger de-peering policy will be "based on the relevant economic and technical data."[35] The only useful point that can be taken from these exceedingly vague and unsupported statements is that there are still several questions regarding post-merger de-peering that remain unanswered.

3. The Act Requires An Evidentiary Hearing Based on the Current Record.

SBC/AT&T argues that EarthLink's hearing request 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."[36] The Applicants' procedural argument fails for several reasons. At the time EarthLink filed its Petition to Deny, it stated that the Applicants had failed in several material respects to provide the factual basis to allow interested parties to comment meaningfully on the Application. It was simply not possible at that time for EarthLink to request an evidentiary hearing in good faith because there were no outstanding material questions of fact due to the facial inadequacy of the Application. The Commission itself supported EarthLink's argument that the initial Application was insufficient when it requested a substantial amount of additional information on April 18, 2005, much of which concerned Internet-related topics. Although EarthLink in its Petition to Deny requested that the Commission schedule an additional round of comments and petitions to deny to be filed within four weeks of the Applicants' complete production of this additional information, the Commission chose not to do so. As EarthLink stated in its August 26, 2005, filing, it was the parties' own exchanges up to that point that revealed that there were several substantial and material questions of fact that remained in dispute. As such, EarthLink raised these material factual disputes as soon as it was able to do so.

EarthLink timely filed its Petition to Deny on April 25, 2005. On August 26, 2005, EarthLink requested an evidentiary hearing, supported by Greg Collins' declaration, which set forth specific allegations of fact showing that the merger is prima facie inconsistent with the public interest. Thus, the only question that remains is whether a request for hearing must be filed at the same time as the Petition to Deny. The statute does not require all requests for evidentiary hearings to be submitted simultaneously with the Petition to Deny. Similarly, none of the Commission decisions

[35] Verizon/MCI Letter at 4.

[36] SBC/AT&T Letter at 4, n. 7.

cited by the Applicants stands for this proposition.[37] In fact, the statute plainly states that the Commission may consider "the application, the pleadings filed, or other matters which it may officially notice" when determining whether there are any substantial and material questions of fact on the record.[38] Thus, the plain language of the statue contemplates that substantial and material questions of fact may not arise until after several rounds of pleadings have been filed. EarthLink respectfully urges the Commission to be careful what precedent it wishes to set on this issue. If the Commission decides to require parties to request a hearing on facially deficient Applications, it will invite both vague applications and vague requests for hearing. Because substantial and material questions of fact logically flow from the parties' discussions, the Commission should not set a hard and fast rule that all hearing requests must be filed at the same time as Petitions to Deny.

Additionally, the Applicants suggest that an evidentiary hearing is not warranted because "EarthLink's petition [is] filled with 'general allegations' and is supported by an affidavit based heavily on 'second-hand information.'"[39] On pages 16 and 17 of its August 26, 2005, submission, EarthLink requested that the Commission designate this proceeding for an evidentiary hearing on five specific issues. Within each issue, EarthLink provided a list of specific questions to aid the Commission in reviewing the core factual disputes between the parties. Not once in their latest filing did the Applicants address a single one of these questions. It is beyond comprehension how the Applicants can ignore almost two pages of specific, disputed factual questions, yet still suggest that EarthLink's request for a hearing is founded on "general allegations." As with many of the Applicants' arguments, the rhetoric directly contradicts the facts, and it is difficult to perceive how the Applicants expect the Commission to rely on this type of "analysis."

The Applicants also argue that Mr. Collins' affidavit is based on "second-hand information." In fact, Mr. Collins has 18 years of experience in the telecommunications operation and networking fields. As the Director of Network Engineering and Operations for EarthLink, Mr. Collins' affidavit was based on his own first-hand, expert knowledge 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. The statute provides that the "applicant shall be given the opportunity to file a reply in which allegations of fact or

[37] The cases cited by the Applicants do not hold that parties must accompany hearing requests with Petitions to Deny. In *In re Minnesota PCS Ltd.*, 17 FCC Rcd. 126 ¶ 5 (2002), a request for an evidentiary hearing was dismissed because the party failed to timely file a Petition to Deny, not because the party did not include a hearing request with a timely filed Petition to Deny.

[38] 47 U.S.C. §309(d)(2).

[39] SBC/AT&T Letter at 6.

denials thereof shall similarly be supported by affidavit."[40] Instead of rebutting Mr. Collins' testimony with evidence from their own experts, the Applicants have instead chosen to attack Mr. Collins' affidavit on a procedural ground, again asking the Commission to rescue them from dealing with the substantive issues in this proceeding.

There is no question that EarthLink has satisfied the two-prong test for an evidentiary hearing. 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…."[41] EarthLink has provided the Commission with a list of specific evidentiary facts that address how the networks involved in this merger 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. That the Applicants chose to ignore this list of specific issues in its response provides no basis for their argument that the first prong has not been satisfied. 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"[42] 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.[43] EarthLink's Petition to Deny and subsequent filings, supported by Mr. Collins' declaration, clearly demonstrate that the combined company will have both the incentive and the ability to discriminate against its retail competitors in its territory. Without any substantive response from the Applicants to the contrary, the merger is therefore prima facie inconsistent with the public interest.

Finally, even assuming *arguendo* that EarthLink does not meet the two-prong test (which it does), the statue requires that "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 merger is in the public interest], it *shall* formally designate the application for hearing."[44] Thus, because the record currently reflects that the merged company will be able to discriminate against its retail competitors, and because the Applicants have chosen not to supplement the record with new evidence or expert testimony, the Commission is required to deny the Application, hold an evidentiary hearing under section 309(e) of the Communications Act, or accept the facts as proven by EarthLink and impose conditions that will remedy the harm caused by the merger.

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[40] 47 U.S.S. §309(d)(1).

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

[42] *Id.*

[43] *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998).

[44] 47 U.S.C. §309(e) (emphasis added).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert K. Magovern, do hereby certify on this 3rd day of October, 2005, that I have caused the foregoing Letter of EarthLink, Inc. 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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