October 10, 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:

In its October 3, 2005, submission,[1] EarthLink, Inc. has done nothing more than repeat arguments previously rebutted in a continuing attempt to create an issue out of the combination of AT&T's Internet backbone assets with SBC's retail ISP services. As with its many prior submissions, nothing in EarthLink's latest submission supports its contention that the merger will lead to anticompetitive or otherwise unlawful discrimination, nor does it warrant prolonging this proceeding to gather additional facts or to hold a public hearing.

The Transaction Will Not Lead to Anticompetitive or Otherwise Unlawful Discrimination

Applicants, in their September 8, 2005 response to EarthLink's prior comments, explained that SBC – in-region – already is a vertically integrated supplier of both Internet backbone services and retail ISP services and, thus, the merger creates no new risk of potential discrimination.[2] EarthLink attempts to rehabilitate its arguments by arguing that AT&T Internet backbone is much larger than and qualitatively different than SBC's Internet backbone, and then claims that

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1 Letter from John W. Butler, Sher & Blackwell LLP, to Marlene H. Dortch, FCC, WC Docket No. 05-65, Oct. 3, 2005 ("EarthLink Oct. 3 Letter"), at 1, 5-6.

2 Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-65, Sept. 8, 2005 ("SBC/AT&T Sept. 8 Letter"), at 1.

"Applicants simply cannot have it both ways."[3] But in fact it is EarthLink that is trying to have it both ways: EarthLink's complaint is limited to claimed discrimination against EarthLink as a retail ISP "in-region."[4] Yet "in-region," all of SBC's Internet customers are *already* on SBC's Internet backbone, and thus SBC is completely vertically integrated with respect to the relevant universe of customers. If, as EarthLink claims, the proposed additional "point of harm" is where the targeted retail ISP competitor's traffic hits the Internet backbone serving the SBC customer, neither the incentive nor the ability to engage in such alleged strategic behavior is affected by the merger.[5] Thus, while it is true that one driver for the combination with AT&T is SBC's efficiency-enhancing goal of offering end-to-end services to domestic and international customers it does not currently have the assets to serve, that fact does not support EarthLink's claimed harms.

EarthLink's letter otherwise contains numerous red herrings and inaccuracies. For example, EarthLink seeks to make much of the lack of regulation over Internet backbones, but it cannot demonstrate the relevance of such lack of regulation. Applicants, in contrast, have shown that in the competitive environment for Internet backbone services that will exist post-merger, SBC/AT&T will not have a high enough share of total Internet traffic to make the targeted discrimination that EarthLink fears an economically viable strategy.[6]

SBC has likewise shown in its September 8 letter that, even accepting *arguendo* that EarthLink would suffer greater relative harm than would SBC from a targeted degradation strategy, both parties would suffer *relative* to all providers

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[3] EarthLink Oct. 3 Letter, at 3-4.

[4] EarthLink thus no longer contests the expert analysis of Dr. Schwartz that the merger will not lead to anticompetitive behavior – in the form of global or targeted depeering – at the backbone level.

[5] For the same reasons, EarthLink's belabored narrowband discussion is neither conceded nor relevant. EarthLink Oct. 3 Letter, at 2, n.3.

[6] Reply Declaration of Dr. Marius Schwartz, at ¶¶ 31-32. Contrary to EarthLink's statements (EarthLink Oct. 3 Letter, at 6, n.16), the "market" defined by the UK Office of Fair Trading was for top-level Internet connectivity, and its conclusions applied in either a global or Europe-wide geographic market. Office of Fair Trading, Anticipated Acquisition by SBC Communications Inc. of AT&T Corporation, Aug. 30, 2005, at ¶¶ 49, 52. In reaching its conclusions, the OFT clearly understood SBC's position as a provider of DSL services. *Id.* at ¶¶ 63, 65, 66 (specifically identifying SBC's "16.7 million U.S. subscribers", and concluding that SBC, post-merger would not be dominant and "could not profitably de-peer unilaterally").

who are not degraded. If an EarthLink customer experienced degradation only when speaking to an SBC customer, the EarthLink customer would not be likely to want to switch to SBC if it has the option to switch to cable. Thus, cable companies would rapidly increase both broadband and VoIP share if SBC/AT&T were to engage in the strategic behavior that EarthLink describes. EarthLink has failed to explain why SBC/AT&T would embark on a strategy designed to shift broadband customers to cable companies, who already enjoy a significant share advantage in the provision of broadband service, and who, as the Commission itself has just recognized, are the BOCs' fiercest competitors for broadband customers today.[7]

Finally, EarthLink claims that it might be de-peered by SBC/AT&T post-merger, and then leaps to the further conclusion that the merged company will de-peer, or threaten to de-peer, *either* retail competitors *or* the Internet backbone providers that the competitors rely on. As to the latter point, nothing in the Reply Declaration of Christopher Rice suggests that the merged firm has any intention of de-peering Tier 1 IBPs and, indeed, Dr. Schwartz's analysis conclusively shows that such de-peering would not be a profitable strategy for the merged firm to pursue. As such, the peering status of IBPs, such as Level 3, on whom EarthLink depends for its Internet transit, is not in jeopardy.

As for the potential that EarthLink itself might be de-peered, Applicants note that EarthLink is *not* peered with AT&T today. EarthLink fails to show why it should be entitled to free access to the merged SBC/AT&T Internet backbone post merger, when it does not qualify for such access pre-merger, under circumstances in which none of the perceived harms from the merger exists.[8] As Applicants noted in their last reply to EarthLink, the fact that EarthLink does not meet a merged firm's peering criteria is no indication that its denial of peering status is the result of the strategic exercise of market power and, indeed, EarthLink's own examples from its August 26, 2005 letter, such as its de-peering by XO following XO's acquisition of Allegiance Telecom, or de-peering by Cogent following its acquisition of Aleron,

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[7] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report & Order and Notice of Proposed Rulemaking, FCC 05-150 (rel. Sept. 24, 2005) ("*Framework for Broadband Access")*; Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-65, Sept. 30, 2005. These documents fully respond to EarthLink's claims (EarthLink Oct. 3 Letter, at 6) about whether there is adequate broadband competition at the retail level. SBC/AT&T Sept. 8 Letter, at 1-2 & nn. 3-4; *Framework for Broadband Access*, at ¶¶ 51-52, 56.

[8] *See* SBC/AT&T Joint Opposition and Reply Comments, WC Docket No. 05-65, at 72 and n.193.

prove otherwise.[9] There will continue to be vigorous competition among IBPs and ISPs after the merger, and nothing in EarthLink's repetitive submissions undermines this conclusion.

EarthLink Has Not Met the Requirements for a Public Hearing

EarthLink's latest reiteration of its demand for an evidentiary hearing is no more persuasive.[10] Among the prerequisites to such a hearing are "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]."[11] In other words, there has to be a plausible theory of merger-specific harm to the public interest, as well as allegations of specific *facts* relevant to the theory that would necessitate and justify a hearing. As we have demonstrated repeatedly, neither of the two theories that EarthLink has advanced – selective degradation and targeted de-peering – satisfies this requirement. The selective degradation theory fails to allege a merger-specific harm – the vertical integration of Internet backbone and retail ISP services that supposedly gives the combined company the ability and incentive to degrade selectively the transmissions of its retail competitors already exists in SBC's region, and EarthLink is unable to show how the merger will change anything. The targeted de-peering theory fails to allege any harm to the public interest at all – EarthLink claims, with no evidentiary support, that the combined company will de-peer it, but then gives examples of situations in which de-peering decisions were fully consistent with a competitive marketplace. In short, the "five specific issues" that EarthLink points to as setting out the "core factual disputes between the parties" and showing that EarthLink made more than just "general allegations" are not factual disputes that can support a hearing request because they do not relate to a plausible merger-specific theory of harm to the public interest.[12]

EarthLink's lack of a plausible merger-specific theory of harm to the public interest is hardly the only deficiency in its demand for an evidentiary hearing. In particular, EarthLink's explanation as to why it was four months late in requesting an evidentiary hearing is laughable. EarthLink claims that the merging parties' original applications (in which Internet-related issues are discussed at length and

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9 *See* SBC/AT&T Sept. 8 Letter, at 3.

10 The EarthLink Oct. 3 Letter offers no new justification for an evidentiary hearing beyond those set forth in EarthLink's letter of August 26, 2005.

11 *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 394 (D.C. Cir. 1985) (quoting 47 U.S.C. § 309(d)(1)).

12 EarthLink Oct. 3 Letter, at 11.

supported by an affidavit) were so inadequate that "[i]t 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."[13] But all the issues EarthLink raises were addressed in the initial applications, the petitions to deny, and the responses thereto. In addition, EarthLink's attempts to rehabilitate its affiant to support its factual assertions and claims of imminent harm are unconvincing: EarthLink's Director of Network Engineering and Operations has no first-hand information about SBC's post-merger peering plans, let alone any expertise in economic theory, notwithstanding the testimony he offered on these points.

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[13] *Id.* at 10. EarthLink also argues that the Communications Act does not require that an evidentiary hearing be requested in a timely petition to deny, but only that that a timely petition to deny precede a request for an evidentiary hearing. *Id.* at 10-11. Even if EarthLink's analysis of the Communications Act is correct, it does not solve EarthLink's procedural problem because EarthLink failed to file a timely petition to deny. The document that EarthLink filed on April 25, 2005, and captioned as a "Petition to Deny" did not include the affidavit required by 47 U.S.C. § 309(d)(1), and EarthLink entered no affidavit into the record until August 26, 2005, which was more than four months after the filing deadline for petitions to deny.

Conclusion

EarthLink's latest submission is merely more of the same tired arguments it has been making for months in this proceeding. The issues surrounding Internet access have been fully argued on the record before the Commission, and Applicants have more than carried their burden to demonstrate that the proposed merger is in the public interest.

Sincerely,

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