

October 18, 2005

EX PARTE

Marlene 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

Ms. Dortch:

In its latest filing, EarthLink repeats arguments that Verizon/MCI already have rebutted concerning its claim that the transaction will harm competition for broadband services.^{1/} EarthLink adds nothing new to the record and fails to overcome Verizon/MCI's showing that the harms that EarthLink hypothesizes will not materialize. As a result, its call for an evidentiary hearing should be rejected.

As we have demonstrated, both the Internet backbone and broadband access service businesses will remain highly competitive following the transaction. In the case of the Internet backbone, the combined company will carry less than 10% of North American Internet traffic, it will rank fourth among seven comparable or larger backbone operators, and operators other than those seven will carry approximately 35 percent of Internet traffic. *See* Reply at 70-80; Kende Reply Decl. ¶ 8. EarthLink does not contest this evidence but deems it (at 5-6) somehow "irrelevant."

EarthLink's argument instead is premised on the assumption (at 2) that the combined company would be "the dominant provider[] of both voice and Internet-based services" in Verizon's service territories and that it could use this alleged dominance to discriminate against competitive rivals. Its assertion (at 2) that we have not "contested" this assumption is absurd. In fact, the record is replete with evidence that there is extensive competition for mass market voice services from intermodal sources such as cable companies, wireless providers, VoIP providers, and other technologies. *See, e.g.*, Public Interest Statement at 37-46; Reply at 49-60; Letter from Dee May, Verizon and Curtis Groves, MCI to Marlene Dortch, Secretary, FCC, WC Docket No. 05-75, Attachment at 27-52 (Sept. 1, 2005) ("Mass Market White Paper").

Likewise, the record in this proceeding demonstrates that consumers have competitive choices for broadband access services. *See, e.g.*, Letter from Dee May, Verizon and Curtis

^{1/} *See* Letter from John W. Butler, Counsel for EarthLink to Marlene Dortch, Secretary, FCC, WC Docket No. 05-75 (Oct. 3, 2005).

Groves, MCI to Marlene Dortch, Secretary, FCC, WC Docket No. 05-75, at 2-3 (Oct. 11, 2005) (“Oct. 11 Response to EarthLink”); Letter from Dee May, Verizon and Curtis Groves, MCI to Marlene Dortch, Secretary, FCC, WC Docket No. 05-75, at 7-9 (Aug. 8, 2005) (“Aug. 8 Response to EarthLink”); Reply at 83-84; Hassett et al. Reply Decl. ¶¶ 38-40. Indeed, approximately 90 percent of *all* U.S. households now have access to broadband service from a provider *other* than their local telephone company, and increasingly from more than one such provider. Hassett et al. Decl. ¶ 58. Within the top 50 MSAs where Verizon provides local telephone service, cable modem service is available to approximately 92 percent of the population, and more generally, the major cable companies provide, or will soon provide, such service in *all* of their service territories. *Id.*; Mass Market White Paper at 28-32; Letter from Dee May, Verizon and Curtis Groves, MCI to Marlene Dortch, Secretary, FCC, WC Docket No. 05-75, at 4-5 (Sept. 7, 2005). While cable modem service is the market leader for broadband services, other technologies such as satellite, wireless, and broadband-over-powerline are emerging as rivals. Hassett et al. Decl. ¶ 58; Hassett et al. Reply Decl. ¶¶ 38-40. For example, Verizon Wireless and Sprint both are in the midst of rolling out EV-DO networks that provide nearly DSL-speed connectivity, and Cingular is following suit with a GSM equivalent. Oct. 11 Response to EarthLink at 3. Indeed, even EarthLink itself has recently announced plans to roll out a WiFi service in Philadelphia. EarthLink Press Release, *EarthLink Selected To Lead Build Out of Wireless Philadelphia* (Oct. 4, 2005).

The Commission has determined that consumers have competitive choices in the form of intermodal alternatives after review of the comprehensive record in the Wireline Broadband classification proceeding:

[A] wide variety of competitive and potentially competitive providers and offerings are emerging in this marketplace. Cable modem and DSL providers are currently the market leaders for broadband Internet access service and have established rapidly expanding platforms. There are, however, other existing and developing platforms, such as satellite and wireless, and even broadband over power line in certain locations, indicating that broadband Internet access services in the future will not be limited to cable modem and DSL service. Changes in technology are spurring innovation in the use of networks. . . . [T]here is increasing competition at the retail level for broadband Internet access service as well as growing competition at the wholesale level for network access provided by the wireline providers’ intramodal and intermodal competitors.

Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 et al. ¶ 50 (rel. Sept. 23, 2005) (“*Wireline Broadband Order*”).

EarthLink ignores this evidence and the Commission’s findings. Indeed, its only response is to suggest (at 6-7) that cable companies may not be providing competitive service in MSAs in Verizon’s territory. As noted above, however, we have provided evidence that within the top 50 MSAs where Verizon provides local telephone service, cable modem service already is available to approximately 92 percent of the population and that the major cable companies provide, or will soon provide, such service in *all* of their service territories. And other

intermodal competitors such as satellite and wireless carriers provide service on a national basis, not in selected MSAs. *See, e.g.*, Public Interest Statement at 36; Mass Market White Paper at 16. Likewise, the Commission refused to analyze the broadband business in terms of local geographic markets as some had suggested, explaining that such a view was too “limited and static” and “fail[ed] to recognize the dynamic nature of the marketplace forces.” *Wireline Broadband Order* ¶ 50.

EarthLink’s speculation (at 4-6) that the combined company will have the ability and incentive to engage in selective discrimination or degradation of competitors’ traffic is inconsistent with the record evidence of this extensive competition. As we have previously explained, such a strategy would not make business sense because it would harm Verizon/MCI’s own customers and cause them to switch to competing providers. *See, e.g.*, Letter from Dee May, Verizon and Curtis Groves, MCI to Marlene Dortch, Secretary, FCC, WC Docket No. 05-75, at 1-3 (Sept. 12, 2005) (“Sept. 12 Response to EarthLink”); *Wireline Broadband Order* ¶¶ 50, 58-59, 62.

EarthLink’s only response is to suggest (at 5) that the “targeted” retail competitor would be hurt more than Verizon/MCI because its customers’ service would “never” work in-region, whereas Verizon/MCI’s customer would suffer service degradation more episodically. But, even if it were true, this response would hardly provide a reason for Verizon/MCI to engage in the strategy EarthLink hypothesizes. The fact remains that Verizon/MCI’s customer would be harmed even in the case of targeted discrimination: as EarthLink itself has noted (Collins Decl. ¶ 7), episodic degradation can be particularly “vexing” to consumers, who will typically blame their own service providers. As a result, if customers of the targeted retail competitor switched, they would be more likely to switch to non-targeted competitors than to Verizon/MCI. Equally important, Verizon/MCI’s customers would have strong incentives to switch to competing providers that were not engaging in degradation, especially since Verizon/MCI’s customers, but not customers of competitors, would always experience degraded service for some of their traffic. In any case, Verizon/MCI would have to degrade connections with numerous competitors on a regular and substantial basis to cause any meaningful shift in customers, and so its customers would receive degraded service for a substantial percentage of their communications. Under any scenario, the end result would be that Verizon/MCI would lose substantial numbers of customers. *See* Opinion of the California Attorney General, *Joint Application of Verizon Communications and MCI, Inc. To Transfer Control*, No. 05-04-020, at 23-24 (Sept. 16, 2005).

Moreover, as we have also explained previously, EarthLink’s discrimination theory also would be impractical from a technical standpoint. *See* Sept. 12 Response to EarthLink at 3-4. Although EarthLink inexplicably asserts (at 1-2) that Verizon/MCI have conceded that their network is already capable of engaging in such discrimination and that it would be “extremely difficult to detect,” we have explained that quite the opposite is true. *Id.* In point of fact, the routers deployed at peering points are not able to engage in the type of detailed packet inspection that would enable them to identify the underlying retail provider from which each packet originated; instead, Verizon/MCI would have to deploy significant staff resources and develop processes, provisioning guidelines, and routing tables. Moreover, the effect of performing 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. And, as we have noted, the targets of degradation could readily detect and evade attempts to degrade their traffic just as purveyors of spam detect and evade measures designed to protect consumers from spam today.^{2/}

EarthLink also repeats its claim (at 7-9) that the combined company will be able to degrade VoIP calls because the "majority" of such calls will be handed off through Internet peering relationships rather than being terminated over the PSTN. As we have previously noted, the best means for interconnection specifically for VoIP traffic has not yet been determined, and so there is no basis for EarthLink's assertion that most VoIP traffic will soon be routed using backbone-to-backbone connections. Sept. 12 Response to EarthLink at 4-5. In any case, even if VoIP traffic were exchanged through backbone connections, Verizon/MCI would not degrade that traffic for the same reasons that Verizon/MCI would not degrade IP traffic generally: doing so would harm its own customers and cause them to leave for competitors.

Finally, EarthLink again repeats its concerns (at 9-10) that the transaction will enable the company to "de-peer" its retail competitors or their backbone operators. As an initial matter, as we have explained, this issue is unrelated to the transaction. *See* Sept. 12 Response to EarthLink at 5-6. In addition, because the Internet backbone business will continue to be highly competitive after the transaction, *see, e.g.*, Reply at 70-80; Aug. 8 Response to EarthLink at 4-7, the combined company will not have the market power that would enable it to make anticompetitive peering decisions. Instead, those decisions will remain dependent on the same variety of economic and technical factors that they do today. Indeed, EarthLink's own backbone provider, Level 3, recently cited many of those factors in explaining its decision to decline to peer with another backbone operator (Cogent). Level 3 Press Release, *Statement Concerning Internet Peering and Cogent Communications* (Oct. 7, 2005). And of course other parties that have raised this issue (e.g., SAVVIS) have in the past declined to peer with Verizon. These decisions, along with EarthLink's own examples of other providers that have declined to peer with it, such as Aleron and Cogent (Collins Decl. ¶ 19), demonstrate that declining to peer where the conditions that make peering economically efficient are not present is a natural occurrence in

^{2/} EarthLink also asserts (at 2) that we have "conceded" that the Commission has not previously regulated Internet backbones and that therefore the combined company could discriminate there without detection or suffering any regulatory consequence. To the contrary, we have explained that any scheme along the lines that EarthLink hypothesizes could only be effective if the blocking or degradation were severe enough to be detected by customers and 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. Sept. 12 Response to EarthLink at 3. And the Commission's statement that it would take into account "net freedom" principles did not suggest it would overlook discriminatory action depending on *where* on the network it occurred. Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 et al. (rel. Sept. 23, 2005).

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the Internet backbone business, not the consequence of market power, and that this issue is not merger-specific.

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In sum, EarthLink's repetition of arguments that it has previously raised and that Verizon/MCI already have rebutted provides no basis to conclude that the transaction will give rise to competitive harm or for the Commission to hold an evidentiary hearing.

Sincerely,



Dee May
Verizon



Curtis Groves
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cc: Michelle Carey
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