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March 8, 2006

Via Electronic Delivery

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

Re: Notice of *Ex Parte* Presentation – WC Docket No. 04-440, *In the Matter of Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from the Title II and Computer Inquiry Rules with Respect to Broadband Services*

Dear Ms. Dortch:

EarthLink, Inc., urges the Commission to deny Verizon's above-referenced forbearance petition for the reasons stated in the attached Opposition to Verizon's Petition for Reconsideration of the *Wireline Broadband Order*, CC Dkt. 02-33. As explained, Verizon's assertion that the level of broadband competition is sufficient to justify forbearance from Title II regulations for its broadband services is erroneous. Indeed, prior to its merger with MCI, Verizon asserted that MCI and other similar carriers were dominant for the services at issue, undermining a basic premise of Verizon's current position. Further, Verizon has failed to reconcile how forbearance would be appropriate just six (6) months after the FCC concluded in the *Wireline Broadband Order* (at ¶ 9) that deregulation for these services was not warranted.

Pursuant to the Commission's rules, one copy of this memorandum is being filed electronically in the above-referenced docket for inclusion in the public record. Please do not hesitate to contact me directly if you have any questions.

Respectfully submitted,

/s/

Donna N. Lampert
Counsel for EarthLink, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10
	)	
Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of The Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises	)	WC Docket No. 04-242
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271

OPPOSITION TO VERIZON PETITION FOR RECONSIDERATION

EarthLink, Inc., by its attorneys and pursuant to Section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f), opposes the "Petition for Limited Reconsideration of the Title I Broadband Order" filed in the above-referenced dockets by the Verizon telephone companies on November 16, 2005 ("Verizon Petition"). EarthLink urges the Commission to dismiss or, alternatively, to deny the Verizon Petition.

The Verizon Petition should be dismissed because it is patently defective under well-established precedent. It raises no new factual, policy, or legal issues that Verizon had not raised

repeatedly in the proceeding below.[1] Indeed, the Verizon Petition is no more than a summary with citations to prior filings of the Bell Operating Company ("BOC") filed position on deregulation of ATM and Frame Relay services. Verizon offers no reason for the Commission to entertain such a petition, which would only encourage parties to file "second bite-at-the-apple" pleadings with a "Reconsideration" title. It would be a waste of Commission and industry resources to entertain the Verizon Petition.

Moreover, the Verizon Petition does not seek reconsideration of the Order,[2] but is primarily a request to obtain more speedy relief in the ongoing special access proceedings that the Commission cited in the Order at footnote 18. For example, while the Verizon Petition requests a "lighter regulatory touch," "[s]crapping the Title II's stringent tariffing system," and the ability to customize service arrangements, the Petition justifies such relief on Verizon's assertions that it operates in a competitive ATM and Frame relay market and without market power. Those claims have all been made, rebutted, and will be addressed in the Commission's

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[1] *In the Matter of UCN, Inc., Transferee, Transtel Communications, Inc., Tel America of Salt Lake City, Inc., Extelcom, Inc.*, Order on Reconsideration, 20 FCC Rcd. 6711, ¶ 8 (2005) ("Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters. APCC has not met this obligation here."); *In the Matter of Federal-State Joint Board on Universal Service*, Order, 19 FCC Rcd. 22305, ¶ 6 (2004) ("it is evident that the Commission has previously considered and rejected the arguments raised in this petition. In sum, the petition presents no new facts or arguments that would persuade us that further reconsideration is appropriate."); *In the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 19 FCC Rcd. 21457, ¶ 8 (2004) ("As discussed below, we decline to grant these requests because petitioners raise no new arguments that were not already considered in the *Report and Order*.").

[2] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd. 14986 (2005) ("Order").

ongoing *Dom/Non-Dom* proceeding or in the ongoing special access proceedings.[3] Reconsideration of subjects such as ATM deregulation that are not addressed in the Order is not reconsideration at all. To the extent that the Verizon Petition asks to avoid the *Computer II* and *Computer III* obligations that apply to the Verizon ATM and Frame Replay services it uses for the Verizon narrowband "dial-up" ISP service,[4] the Order confirms that such obligations are beyond the scope of the Order and continue in effect.[5] The Verizon Petition offers no justification for changing the Title II access rights of unaffiliated dial-up ISPs to these transport services.

To the extent the Verizon Petition seeks relief beyond the "lighter regulatory touch" that may be provided in the ongoing proceedings, Verizon is asking the Commission for a Title I right to unjustly discriminate between one stand-alone ATM customer and another. The Verizon Petition offers absolutely no factual or legal justification for the Commission to sanction Verizon's desire to discriminate in the stand-alone ATM market, and such issues are expressly outside the scope of the decisions made in the Order. For example, the Verizon Petition fails to rebut the record evidence that shows Verizon and other BOCs have the ability and incentive to discriminate against competitors and customers that must rely on BOC ATM and Frame Relay

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[3] *Compare with*, Order, ¶¶ 84, 85 (FCC declines to reach the issue of dominance or nondominance of incumbent LECs).

[4] According to Verizon's website-posted Comparably Efficient Interconnection plan and amendments, Verizon's ISP uses both Verizon ATM and Frame Relay services that are, in turn, required to be available to other ISPs on an equal access basis. *See* http://www22.verizon.com/about/publicpolicies/cei/ (visited Dec. 29, 2005).

[5] Order, n. 15 ("This Order *does not* implicate the current rules or regulatory framework for the provision of access to narrowband transmission associated with dial-up Internet access services or other narrowband or broadband information services when provided by facilities-based wireline carriers.").

services. This is especially true given the BOCs' special access price increases and control over the vast majority of "last mile" facilities necessary to provision such services.[6]

Further, while the Verizon Petition rests primarily on the assertions that, after the merger with MCI, Verizon will "not be in any position to exercise market power"[7] in the ATM and Frame Relay markets, Verizon has torpedoed its credibility on this matter. Specifically, in 2002 and 2003, Verizon asserted to the Commission in this proceeding that: "the incumbent long-distance carriers are the dominant players" in the ATM and Frame Relay markets;[8] "the largest providers of both Frame Relay and ATM services are AT&T, WorldCom, and Sprint, which control more than two-thirds of the nationwide market for these services. . . . As one analyst noted, '[t]he Big 3 IXCs own the U.S. frame relay market, have scale economies and are best positioned to influence users and move the market;'"[9] and "Incumbent IXCs are the dominant players" in ATM and Frame Relay.[10] Verizon's flip-flop on the facts is reason enough to dismiss or deny the Verizon Petition.

Moreover, Verizon wholly ignores perhaps the key post-merger issue confronting the Verizon Petition: How can the Title I deregulation of ATM and Frame Relay and other special access services requested in the Verizon Petition possibly comport with the binding special

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[6] *See, e.g.*, August 26, 2004 Ad Hoc Telecommunications Users Ex Parte, CC Dkt. No. 02-33, et al. (submitting White Paper "Competition in Access Markets: Reality or Illusion" prepared by Economics and Technology Inc.).

[7] Verizon Petition at 14.

[8] Comments of Verizon, CC Dkt. No. 02-33, at 16 (filed May 3, 2002).

[9] "Broadband Fact Report," at 28, *attached to*, May 3, 2002 Comments of Verizon. *See also*, "Competition for Special Access Services Report," *attached to*, Verizon July 1, 2003 Ex Parte, CC Dkt. No. 02-33, et al. (same statements).

[10] "Enterprise Market," at 4, attached to, Verizon June 25, 2003 Ex Parte, CC Dkt. No. 02-33, et al.

access conditions that Verizon has agreed to in the FCC's *Verizon-MCI Merger Order*.[11] Thus, the Petition fails to address whether Title I deregulation of ATM/Frame Relay and other special access services would leave Verizon free to exclude such services from the following merger conditions: (1) the "service quality measurement plan"; (2) the commitment not to provision special access services to Verizon or its affiliates that are not generally available to similarly situated customers (i.e., "holding out" a nondiscriminatory offering); (3) the commitment to provide services to unaffiliated customers on a contract tariff basis; and (4) the commitment not to increase rates on special access services in its interstate tariffs. If Verizon means for the merger conditions not to apply to Verizon ATM or Frame Relay services, then the Verizon Petition is a superficial attempt to renegotiate the terms of FCC's consent to the Verizon-MCI merger, which the FCC should reject summarily. If, however, Verizon asserts that the merger conditions would apply to its ATM and Frame Relay services even under Title I deregulation, then the Verizon Petition only begs the question of how that relief would be consistent with its obligations under the merger conditions. For example, if the Verizon Petition were granted and Verizon could offer ATM on better terms and/or rates to a Verizon affiliate, how could it simultaneously meet the merger condition to offer such services on a nondiscriminatory basis to unaffiliated customers? The Verizon Petition should be denied as vague and obtuse on these basic post-merger questions.

Finally, it is worth noting that, among its many errors, the Verizon Petition (at 6) wrongly characterizes the Order (¶¶ 103, 104) as permitting Title I private carriage of ATM and Frame Relay that Verizon sells to competing ISPs. Verizon has completely misread the Order, which

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[11] *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, FCC 05-184, WC Docket No. 05-75, Appendix G (special access conditions) (rel. Nov. 17, 2005).

permits (wrongly in EarthLink's view) the BOCs to provision on a Title I basis to ISPs only the broadband transport directly connecting residences and businesses.[12] The provision of ATM and Frame Relay to ISPs is, therefore, not deregulated under the Order.

CONCLUSION

For the foregoing reasons, the Commission should dismiss or, alternatively, deny the Verizon Petition.

Respectfully submitted,

/s/

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December 29, 2005

[12] Order, ¶ 9 & n. 15 (In describing the scope of the Order, the Commission distinguished between "wireline broadband Internet access services," including the transmission component (i.e., DSL, FTTP), that is the subject of the Order's deregulation, and other wireline broadband services including "stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services . . .").

CERTIFICATE OF SERVICE

I, Sybil Anne Strimbu, state that a copy of the foregoing *Opposition to Verizon Petition for Reconsideration* was sent via electronic mail, this day, Thursday, December 29, 2005, to:

William H. Johnson
1515 North Courthouse Road
Suite 500
Arlington, VA 22201
will.h.johnson@verizon.com

/s/
Sybil Anne Strimbu