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September 22, 2005

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 – 12th Street, SW
Washington, DC 20554

Re: **SBC/AT&T Merger Application - WC Docket No. 05-65;**
Verizon/MCI Merger Application - WC Docket No. 05-75

Dear Ms. Dortch:

In previous comments and ex parte submissions,[1] BridgeCom International, Broadview Networks, Conversent Communications, Eschelon Telecom, NuVox Communications, TDS Metrocom, XO Communications, and Xspedius Communications (the "Joint Commenters") have supplied the Commission with evidence regarding the

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1 *See, In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Petition to Deny of Cbeyond Communications, Conversent Communications, Eschelon Telecom, NuVox Communications, TDS Metrocom, XO Communications and Xspedius Communications, DA 05-656, WC Docket No. 05-65 (filed Apr. 25, 2005); *In the Matter of Verizon Communications, Inc. and MCI Corp. Applications for Approval of Transfer of Control*, Petition to Deny of Cbeyond Communications, Conversent Communications, Eschelon Telecom, NuVox Communications, TDS Metrocom, and XO Communications, DA 05-762, WC Docket No. 05-75, (filed May 9, 2005); Ex Parte Presentations of Simon Wilkie, Economist, WC Dockets Nos. 05-65 and 05-75, May 9, 2005, June 15, 2005, and Aug. 1, 2005. Ex Parte Letters from Brad E. Mutschelknaus, Kelley Drye & Warren LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Dockets No. 05-65 and 05-75, June 6, 2005, July 14, 2005, and Aug. 31, 2005.

development and functioning of the local wholesale market for loops to end user locations and transport within metropolitan areas – a market that is taking on growing importance as Unbundled Network Elements ("UNEs") are delisted and Incumbent Local Exchange Carrier ("ILEC") special access rates continue to increase far in excess of cost, producing supranormal profits.[2] Further, the Joint Commenters have shown that AT&T and MCI – the two largest local competitors – play the critical, leading role in that market, causing prices to decrease significantly.[3] The rates these two companies offer for local wholesale circuits are on average approximately 50% below the special access rate offered by SBC and Verizon, and, just as importantly, even if these two companies do not win the contract, their very presence causes rates offered by other providers to decrease to at least these levels. Further, it is clear that post-merger, other competitors would not "expand or enter with sufficient strength, likelihood and timeliness to render unprofitable an attempted exercise of market power resulting from the merger."[4] As a result, should the proposed SBC/AT&T and Verizon/MCI mergers be consummated – and AT&T and MCI no longer provide wholesale services – a working, viable wholesale market will be seriously harmed, and wholesale and retail business customers will suffer greatly. It is for that reason that the Commission should reject these proposed mergers. As proposed, they clearly do not serve the public interest, convenience and necessity. It is important to note that such a determination by the Commission is the norm for proposed mergers by Regional Bell Operating Companies ("RBOC"). Since the 1996 Act, every proposed acquisition by a RBOC of another major carrier has been found to be unlawful due to their likely anti-competitive effects.[5]

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2 *See, e.g.*, Economics and Technology, Inc., *Competition in Access Markets: Reality or Illusion*, Prepared for the August, 2004 Ad Hoc Telecommunications Users Committee, WC Docket Nos. 05-65 and 05-75 at 27-40. *See also*, Ex Parte Letter from Patrick H. Merrick, Esq, Director-Regulatory Affairs, AT&T Federal Government Affairs to Marlene H. Dortch, Secretary, Federal Communications Commission, RM No. 10593 (May 1, 2003) ("there is indisputable proof that the large ILECs and particularly the Bells, retain market power in the provision of special access services, the ILECs are abusing that [market] power with unjust and unreasonable rates…"). *See also*, *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Comments of MCI, Inc., WC Docket No. 04-313 and CC Docket No. 01-338, 154-62 (Oct. 4 ,2004).

3 AT&T's and MCI's competitive presence is comprised of much more than the local network facilities of the two companies. Because of their substantial size, they are able to negotiate substantial term and volume discounts for special access circuits from SBC and Verizon. They also have enormous customer bases from their domestic and international long distance businesses that they can use to enter local markets, and, of course, since both are Fortune 100 companies, they have significant financial resources.

4 *Applications of NYNEX Corp. and Bell Atlantic Corp. For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶11 (1997) ("*NYNEX/Bell Atlantic Merger Order*").

5 *See generally*, *GTE/BellAtlantic Merger Order*, 15 FCC Rcd 14032 (2000); *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712 (1999); *NYNEX/Bell Atlantic*

Despite a determination that the proposed mergers are not in the public interest, the Commission may decide to approve the transactions by using its authority pursuant to Section 214(c) of the Act to impose transaction-specific terms and conditions to remedy the anti-competitive effects of the proposed mergers. That was the approach used by the Commission in all prior RBOC mergers. If the Commission decides to once again use this approach, the Joint Commenters believe the following remedies taken together are vital, although not sufficient, to alleviate the competitive harm to the local wholesale market.

1. ENSURE RATES, TERMS, AND CONDITIONS FOR SPECIAL ACCESS CIRCUITS REFLECT PRE-MERGER MARKET CONDITIONS

As stated above, because of AT&T's and MCI's competitive presence, competitive providers are able to access loop and transport circuits at rates far below SBC's and Verizon's special access rates and upon terms and conditions that reflect competitive conditions. To ensure these market rates, terms, and conditions continue post-mergers, it is essential that the Commission adopt the following pricing and performance remedy.

> For a five year period from the date the mergers are consummated (with a possible five year extension), providers of telecommunications services should have a right to choose to obtain special access circuits from SBC and Verizon at rates, terms, and conditions either (1) as set by the Commission based on at a re-initialized rate of return of 11.25% calculated from 1999, or (2) as determined by commercial negotiations with a requirement that "baseball arbitration" be used if the negotiations fail.[6]

Merger Order, 12 FCC Rcd 19985 (1997); *Cingular/AT&T Wireless Merger Order*, 19 FCC Rcd 21522 (2004).

6 *See, In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, MB Docket No. 03-124, Appendices B and C (rel. Jan. 14, 2004) (The Commission employed the remedy of commercial negotiations with baseball arbitration). See, also, *GTE CORPORATION, Transferor and BELL ATLANTIC CORPORATION, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC 00-221, 15 FCC Rcd 14032 (June 16, 2000 Appendix D(VI), ¶19(b), "To the extent that Bell Atlantic/GTE and CLECs cannot reach agreement regarding the scope of the collaborative process, they may be resolved through arbitration process set forth in Paragraph 21."

Specifics of Access to Special Access Circuits at Reinitialized Rates:
The recalculated rate of return will be flowed through proportionately to rates for all services, and these rates will be maintained for the entire five year period. These rates will be available regardless of whether the provider purchases other services or facilities of SBC and Verizon, and the requesting provider will be able to terminate service at any time without incurring a penalty. Finally, to ensure competitors have non-discriminatory access, if the merging parties offer better rates or service arrangements to any affiliated entities, requesting providers may access those rates and arrangements.[7]

Specifics of Access to Special Access Circuits via Commercial Negotiations/Baseball Arbitration:
The arbitration would be conducted by the American Arbitration Association with strict time limits to reflect the need to meet normal commercial conditions. The final offers from both parties would be in the form of a contract for access services (including prices, terms and conditions, service level agreements, and performance remedies) for a minimum 1 year and maximum 5 year period with automatic renewals.[8] The arbitrator would choose the final offer that most closely approximates the lowest (market) rates existing prior to the proposed mergers in the SBC and Verizon regions as offered by AT&T, MCI, or any other provider. If the telecommunications provider seeks in its final offer to continue a pre-merger agreement with AT&T or MCI for the provision of local wholesale services, that agreement shall automatically be adopted by the arbitrator.

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7 As an alternative to replacing the existing special access tariffs, the Joint Commenters observe that neither SBC nor Verizon has yet fulfilled its statutory obligation to make a set of unbundled transport and loop UNEs available pursuant to Section 271 of the Act. *See*, 47 U.S.C. § 271(c)(2)(B)(iv) -(v). The Commission could require either: (1) SBC and Verizon to calculate what the rates for special access mileage and channel terminations would be if they were re-priced to provide a 11.25% rate of return and then order those rates to be offered regionwide as Section 271 UNEs; or, (2) SBC and Verizon to make a set of unbundled loop and transport Section 271 UNEs available region-wide at rates established at 115% of the existing Section 251 UNE rates, an approach the Commission found to be appropriate as a transitional rate mechanism and adopted as rules in the Triennial Review Remand Order. *See*, for UNE loops, 47 C.F.R. §§ 51.319 (a)(4)(iii) and (a)(5)(iii), and for UNE transport 47 C.F.R. §§ 51.319 (e)(2)(ii)(C), (e)(2)(iii)(D), and (e)(2)(iv)(B).

8 If, as part of its offer, the telecommunications provider seeks to convert UNE facilities to special access circuits, it shall be permitted to continue to use the UNE ordering platform.

2. ENSURE UNE AVAILABILITY AND PRICING REFLECT HARM CAUSED BY AT&T'S AND MCI'S EXIT FROM THE MARKET

Currently, providers of competitive services can order critical wholesale inputs (loops and transport) either as special access or as UNEs. Most competitive local service providers order these inputs as UNEs, particularly those serving small and medium sized businesses. To provide relief that is equally available to all competitive providers and to ensure competition in the provision of local services equivalent to pre-merger levels of competition, UNE access to these inputs must be maintained for a period of time comparable to the relief afforded with respect to special access.

A. Cap UNE Pricing

Prices for key UNE inputs (transport, high capacity loop circuits, and UNE-L loops) have been set after extensive state level proceedings. As with competitive wholesale services available prior to consummation of the proposed mergers, UNE prices for these inputs are substantially below special access prices. In addition, since the 1996 Act, AT&T and MCI have played the leading role in the lengthy and resource intensive state rate proceedings to establish rates for UNEs and in negotiating and arbitrating interconnection agreements ("ICAs"). If the mergers are consummated, the discipline previously imposed in the UNE rate setting process by the participation of AT&T and MCI will be lost. Remaining competitive providers should not be forced to relitigate UNE cost cases. They require stability in the regulatory environment to provide marketplace pricing discipline to "replace" the competition lost as a result of these mergers. Therefore, to remedy the demonstrable harm from the mergers, the Commission should cap UNE prices in the SBC and Verizon regions for a period of five years. In addition, parties who order loops (including high capacity and UNE-L loops) and transport elements via UNE processes, should have the continuing right to order via these processes, but should have the right to "opt out" of UNE prices and avail themselves of the commercial negotiation/arbitration process described above for special access services.

B. Freeze on Further UNE Delisting

The Commission has recently completed extensive proceedings that have established a going forward framework for UNE availability. This framework is critical for competitive providers to access remaining UNE inputs on a stable and predictable basis, and therefore to replicate competitive conditions prior to the mergers. Because AT&T and MCI dominated the competitive presence in local markets, if the proposed mergers are consummated, retail and wholesale business customers will suffer greatly and will be seeking to replicate their competitive presence as

rapidly as possible. But, the evidence demonstrates that the competitive presence of AT&T and MCI took many years to develop, that it is based upon their global strength and financial resources, and that the financial community is reluctant to fund new entry. Consequently, there is no reason to believe entry will be timely, likely, or sufficient. It is for that reason that the Commission must ensure there is stability in access to loop and transport UNEs, which competitive providers rely upon to fill out their networks. The Commission should adopt a condition that in the SBC and Verizon regions, at a minimum, the status quo ante (subject to the exception described below) with respect to UNE availability will be preserved for a period of five years. In addition, SBC and Verizon should be required to make their loop and transport facilities available as UNEs regardless of the underlying technology.

C. Eliminate AT&T and MCI as Collocators in SBC and Verizon Wire Centers and Recalculate the Listing of Loop and Transport UNEs

Under the rules adopted in the *Triennial Review Remand Order* ("TRRO"),[9] loop and transport UNEs are delisted based on a combination of the number of lines in a wire center and/or the number of ***unaffiliated*** fiber-based collocators.[10] Once a determination is made that these thresholds are met and the relevant UNEs are delisted, SBC and Verzion are alleging that this action cannot be reversed even if the number of lines in the wire center or the number of collocators decrease. However, it is clear that the competitive presence of AT&T and MCI were crucial to the Commission's justification for adopting the wire center/collocator test to determine whether UNEs should be delisted. In addition, the mergers were announced virtually simultaneously with release of the TRRO, and so did not reflect the effect of the mergers on the number of unaffiliated collocators post merger, for purposes of delisting. The Commission must take the mergers into account in the delisting process. Finally, because the Joint Commenters have demonstrated in the record that due to the "collusive effects" of the proposed mergers, SBC and Verizon are highly unlikely to compete with one another in the wholesale market post-merger, the competitive presence of AT&T and MCI will be lost in both SBC and Verizon regions. The Commission, therefore, should adopt a

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9 *In the Matter of Unbundled Access to Network Elements* (WC Docket No 04-313); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), Order on Remand, FCC 04-290 (rel. Feb. 4, 2005).

10 *See* 47 C.F.R. § 51.319 (a)(4)-(5) for loops and § 51.39 (d)(3) for transport. The term "fiber-based collocator" is defined in § 51.5 to include only carriers that "are unaffiliated with the incumbent LEC."

remedy requiring the recalculation of the wire centers removing both AT&T and MCI as collocators in both the SBC and Verizon regions.

The Commission also should suspend for five years application of the "one-way ratchet" rule for SBC and Verizon. The Commission based this rule on a view of local markets and the state of competition that included the active and ongoing presence of the two largest CLECs: AT&T and MCI. Because the Commission relied on the pre-merger state of competition as basis for the "one-way ratchet" rule, it is only equitable that this rule be suspended while local competition has an opportunity to regenerate.

D. Remove DS1 Loop and Transport Caps

In the TRRO, the Commission limited the number of DS1 loop UNEs that a requesting carrier could obtain to a maximum of ten DS1 loops to a building.[11] It also capped DS1 transport UNEs to a maximum of 10 DS1 dedicated transport circuits.[12] Evidence in the TRRO record indicates that competitive providers normally use DS1 loop and loop-transport (EEL) circuits to supply individual customers and do not, therefore, aggregate them onto larger DS3 pipes. As a result, once the DS1 loop or transport cap is breached, the competitive provider will need to turn to the wholesale market. However, if the mergers are consummated, the two largest local wholesale providers, AT&T and MCI, will exit the market – and these competitive providers will then have to rely on much higher-priced special access circuits provided by SBC and Verizon. Consequently, to restore the current competitive environment, the Commission should remove the caps for DS1 loop UNEs for a period of five years.

3. FRESH LOOK

The Alliance for Competition in Telecommunications ("ACTel"), of which most Joint Commenters are members, recently placed in the record a just completed survey by the Center for Survey Research & Analysis at the University of Connecticut concluding that most large business customers of AT&T and MCI believe the proposed mergers would harm them by leading to higher rates, less innovation, and decreased responsiveness to customers.[13] These findings of harms to business customers from the

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11 47 C.F.R. § 51.319 (a)(4)(ii).

12 47 C.F.R. § 51.319 (e)(2)(ii)(A).

13 *See* Center for Survey Research & Analysis, University of Connecticut, *Views of the Proposed AT&T/SBC and MCI/Verizon Mergers: From the Perspective of Fortune 1000 AT&T and MCI Customers* (Sept. 2005) ("*Customer Survey*").

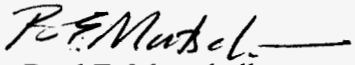
proposed mergers are supported in reports by investment analysts.[14] It is clear that these proposed mergers will change fundamental expectations of the business customers as to their telecommunications providers and the nature of competition in the marketplace. To alleviate these harms, businesses customers that have existing contracts with AT&T and MCI should be given the opportunity (18 months) to find other sources of supply without incurring any termination penalties or without having to meet revenue or circuit commitments to obtain discounts.

4. CONCLUSION

The Joint Commenters have documented that these proposed mergers of the largest incumbent carriers and their largest competitors will gravely harm the local competitive landscape for business customers. This evidence is most graphically demonstrated by the ACTel *Customer Survey*. Because these mergers are blatantly anti-competitive, the Commission should reject them out-of-hand as failing to serve the public interest, convenience, and necessity. However, if the Commission decides to proceed in the face of this sound and overwhelming evidence, it must adopt sufficient and stringent remedies to offset these harms. The remedies proposed herein are targeted and essential to achieve that objective.

Please do not hesitate to contact the undersigned if there are any questions regarding the foregoing.

Sincerely,



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14 For instance, in its June, 2005 Equity Research Report on *U.S. Wireline Services*, Bear Stearns writes, "We believe [that because of the proposed mergers] customers are concerned that the price leverage gained since the Telecom Act of 1996 will be eroded. Further, some customers are concerned that customer service, which has generally improved since the passing of the Telecom Act of 1996 and again following the completion of the 271 process, may suffer from a less intense competitive dynamic." *Id.* at 40. In addition, Bear Stearns concludes about the SME market that, "As the mergers are finalized, we expect competition in the SME market to slow down…[and we] believe pricing is likely to stabilize and possibly rise over time. In our view, the megacarriers [SBC and Verizon] may seek to stabilize pricing quickly in order to meet or exceed public merger synergy targets." *Id.* at 41.

Counsel for BridgeCom International, Broadview Networks, Conversent Communications, Eschelon Telecom, NuVox Communications, TDS Metrocom, XO Communications and Xspedius Communications

cc: Chairman Kevin Martin
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Daniel Gonzalez
Michelle Carey
Russ Hanser
Jessica Rosenworcel
Scott Bergmann
Sam Feder
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