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August 5, 2005

By Electronic and Overnight Delivery

Hon. Jaclyn A. Brilling
Secretary
NYS Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 05-C-0237 - Joint Petition of Verizon New York, Inc. and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger; and

Case 05-C-0242 - Joint Petition of SBC Communications Inc., AT&T Corporation, together with its Certificated New York Subsidiaries, for Approval of Merger.

Dear Secretary Brilling:

Enclosed for filing in the above-referenced proceeding please find an original and 5 copies of the Comments of the Competitive Carrier Group on the Department of Public Service Staff's White Paper.

Copies of this filing have been sent electronically to the parties on the Active Parties Lists for this proceeding.

Respectfully submitted,

Karly E. Baraga

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 05-C-0237 Joint Petition of Verizon New York Inc. and MCI Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger.

Case 05-C-0242 Joint Petition of SBC Communications, Inc., AT&T Corporation together with its Certificated New York Subsidiaries, for Approval of Merger.

COMMENTS OF THE COMPETITIVE CARRIER GROUP ON STAFF WHITE PAPER

Pursuant to the Commission's Notice Soliciting Comments on Staff White Paper, issued July 6, 2005 ("Notice"), Broadview Networks Inc., Broadview NP Acquisitions Corp., BridgeCom International Inc., DEICA Communications, Inc. d/b/a Covad Communications Co., CTC Communications Corp., and XO Communications Services, Inc. (the "Competitive Carrier Group" or "CCG") hereby submit their comments on the Staff White Paper analyzing the competitive consequences of the proposed acquisition of MCI, Inc. ("MCI") by Verizon New York, Inc. ("Verizon")

I. INTRODUCTION

The Competitive Carrier Group is pleased to have this opportunity to comment on the Department of Public Service Staff White Paper analyzing the potential competitive consequences of the proposed Verizon-MCI merger. In its initial comments in this proceeding, the CCG stated its opposition to this merger and proposed, at a minimum, that the Commission undertake a full evaluation of it. Staff has risen to that challenge. The White Paper is a sophisticated, highly professional competitive analysis. Most fundamentally, it respects the fact that a merger analysis is an analytically rigorous and quantitative exercise. Staff's careful exploration of the several relevant markets, and its detailed exploration of market data have allowed it to present an insightful evaluation of the potential competitive consequences of this proposed merger.

Staff properly relies on and carefully applies the methodologies for defining markets and measuring market concentration establish in the Horizontal Merger Guidelines issued by the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") in 1992, and revised in 1997 (the "Guidelines"). The Guidelines encapsulate an analytical framework recognized not only by the DOJ and the FTC but by antitrust regulatory authorities in most developed nations, including the European Union. They offer far and away the most fully realized tools for determining the competitive consequences of any horizontal merger and have proven over many years to be a rigorous method available for evaluating the probable competitive -- and anticompetitive -- consequences of a horizontal merger. Staff has mastered the Guideline's concepts and analytical techniques, and has carefully applied them to the facts as they exist in New York.[1] And unsurprisingly, Staff has concluded that the merger raises serious, indeed grave, competitive concerns in virtually every market that the merger affects. We agree.

While the White Paper is detailed in its underlying diagnosis of the consequences that would arise from the merger, it rightfully takes a more tentative approach towards the issue of treatment. This, too, is sound at this stage of the investigation. The White Paper states that: "any anticompetitive impacts of the mergers must be balanced with a combination of remedies and/or benefits before the Commission can conclude that the mergers are in the public interest."[2]

1 We would be remiss if we did not acknowledge our respect for the sheer amount of work that the White Paper obviously represents in a relatively short period of time.

2 White Paper at 12.

It is, of course, black letter law that, pursuant to §§ 99(2) and 100 of the Public Service Law, the Commission may not approve the proposed transfer of franchise rights or purchase of stock unless it is persuaded that the transaction is in the public interest.[3] The CCG does not believe that any merger that has unresolved, material anticompetitive consequences could satisfy the State's public interest test solely on the basis of other benefits unrelated to competition. However, that is largely a theoretical distinction. In the current case, there is no possibility that any non-competition related consequences could compensate for the severe anticompetitive consequences of this merger absent substantial offsetting conditions. Indeed, it is hard to identify such benefits at all. For these reasons, CCG recommends that the Commission reject the merger outright.

To the extent the Commission is not so inclined, however, CCG alternatively recommends that the Staff and the Commission devote the same degree of rigor to its analysis of what conditions will suffice to offset the significant anticompetitive consequences of the merger. We will discuss, below, several of the Staff's proposed remedies, together with others that Staff has not suggested. We will show how, collectively, these remedies offer some prospect of ameliorating, although not eliminating, the anticompetitive consequences of the merger.

II. STAFF HAS CORRECTLY RECOGNIZED THAT THE CENTERPIECE OF ANY HORIZONTAL MERGER ANALYSIS IS MARKET DEFINITION, AND HAS PROPERLY IDENTIFIED SEVERAL IMPORTANT MARKETS AFFECTED BY THIS MERGER

As Staff has properly concluded, the impact of the proposed Verizon-MCI merger on competition in New York should be a central feature of the Commission's analysis. In

[3] It is astonishing that, this late into the application process, Verizon has yet to even attempt to make anything like a professional quality presentation justifying its proposed merger under the Merger Guideline tests.

evaluating this critical factor, the standard tests summarized in the Merger Guidelines must form the basis of the analysis. The Guidelines describe the tests for: (1) defining relevant markets; (2) measuring the degree of concentration in the markets before and after a proposed merger; (3) identifying likely adverse effects from a merger, which may include price increases (unilateral effects) that arise from the resulting change in market structure (coordinated effects); (4) determining whether firms other than the merging parties could enter the relevant market to compete and whether such firms would be mere fringe competitors or would be able to expand their competition in order to discipline the prices and conduct of the newly merged firm; and finally (5) analyzing whether the merged firm would enjoy such increased efficiencies that the merger should be approved regardless of deficiencies in the other areas.

As the Guidelines make clear, market definition is the centerpiece of antitrust merger analysis. Any discussion of the competitive effects of a merger that is not based on a working definition of the relevant geographic and product market is, quite simply, meaningless. Moreover, Staff has clearly recognized that market definition is a rigorous, quantitative exercise, based on an analysis of consumers' ability to satisfy their demand for a product, in a geographic area, by using *substitutes*, if any, for the merging firms' outputs.

Once a product and geographic market definition is established, the Herfindahl-Hirschman Index or "HHI" can be calculated to evaluate the impact of the merger on market concentration. As Staff notes, an HHI greater than 1,800 defines a highly concentrated market. In such a market, a post-merger increase in the HHI greater than 50 index points warrants investigation of the merger, while an increase greater than 100 creates a presumption that market power has actually increased.[4]

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[4] White Paper at 16.

III. STAFF HAS PROPERLY CONCLUDED THAT THE ENTERPRISE MARKET IS HIGHLY CONCENTRATED AND THAT THIS MERGER WOULD SIGNIFICANTLY INCREASE CONCENTRATION IN THAT MARKET

Staff has largely treated the medium and large business market as a single entity, and has concluded that "the proposed merger results in an increase in concentration in the enterprise market which exceeds the threshold levels in the DOJ/FTC Guidelines and, therefore, requires countervailing remedies."[5] The finding that the medium and large business market, viewed as a whole, has a pre-merger HHI in excess of 4,000, with a 398 point increase caused by the merger, certainly compels that conclusion. Staff's finding that the New York medium and large business market has a pre-merger HHI of 2,924, with a merger increase of 1,755 index points, renders its conclusions understatements.

It is instructive to compare these numbers with those in the Merger Guidelines. The Guidelines define a highly concentrated market as having an HHI of greater than 1,800: here the initial concentration level is more than 1,000 index points higher than that highly concentrated market threshold. And, in this already highly concentrated market, where the Guidelines prescribe that an increase in the HHI of 100 index points would warrant a presumption of an increase in market power, the actual increase in the HHI found by Staff is 17 times the level that would require that presumption. Plainly, these numbers are orders of magnitude beyond any that could be found acceptable under the Guidelines or any principles of policy designed to protect the public from the abuse of concentrated market power. An increase

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5 White Paper at 32.

in market concentration of 100 index points might be "rebuttable," but an increase of 1,700 is not.[6]

Yet, as extraordinary as these numbers are, Staff has still understated the problem because it has defined the market too broadly. By treating the "enterprise market" as a single entity that includes both the large scale market and the mid-sized and more localized business market, these numbers mask the degree of market concentration and market power that this merger will create for the mid-sized business market alone.

Verizon itself attempts to justify this merger on the ground that it will enable Verizon to begin to compete effectively for "enterprise and government" customers for whom (it alleges) it has not been a successful competitor to date.[7] Verizon states that these customers require carriers "to manage complex network assets and applications"[8] and to provide a wide array of services.[9] Verizon contrasts this market with its "regionally focused" business which, it asserts, "does not even address the top-most portion of the national enterprise market"[10] It

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6 The White Paper correctly notes that an HHI review does not set forth the sole criteria to be considered in evaluating a horizontal merger. However, as the Guidelines make clear, where the HHI shows high levels of concentration, a principal focus is on whether any other factors indicate that the historical picture will not remain accurate in the near term. Merger Guidelines, Section 1.52. A merger will not create or enhance market power if market entry is easy and, to that end, the Guidelines analyze the "timeliness, likelihood and sufficiency of the means of entry. . ." *Id.*, Section 3.1. Here, however, Verizon's control over the mid-sized business market has been persistent and remains so. Neither price nor market data show a material change in Verizon's control over this market today or in the near future. Indeed, Staff considered this issue as well and cited material indicating that post merger conditions would lead to a lessening of competition and persistent increases in price. White Paper at 30, 31.

7 Joint Petition at 10-12.

8 *Id.*

9 *Id.*

10 *Id.*

concludes that "Verizon would require years to develop the capabilities to compete effectively for such [national account] customers. . ."[11]

In testimony submitted on behalf of Verizon in Pennsylvania, Verizon's witness Paul B. Vasington expanded on this distinction:

> [C]ustomers in the large enterprise segment of the market (i.e., Fortune 1000 companies, federal government agencies, large state agencies and similar sized institutions) are among the most sophisticated consumers of communications services. These customers purchase complex, integrated packages of voice and data services through competitive procurement or individually negotiated contracts. These customers also typically require services at multiple locations, and often require customization of network functions and systems.[12]

Through its Application and testimony, Verizon itself has illustrated the differences in mid-sized business and enterprise markets, clearly making a distinction between the "regionally focused" mid-sized business market in New York, in which Verizon admittedly competes in today, and Fortune 1000/large government customer market, which they propose to enter more quickly through merger. The mid-size business market in New York is, therefore, a separate and discrete relevant market that is clearly distinguishable from the market for customers such as the Fortune 1000. It is (as Staff recognized) geographically localized.[13] It has discrete technology needs, typically requiring standard DS1-level or higher access facilities that are simpler than those required by the large enterprise segment but more complex than the mass market requirements served by competitors, if at all, by UNE-P or under the new "commercial

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11 *Id.*

12 Testimony of Paul B. Vasington on behalf of Verizon (Verizon-MCI Merger), page 16.

13 *Id.*

agreements."[14] Customers in the mid-sized market also have different price and service requirements than large business customers who are (as Verizon reports) characterized by multiple locations, specialized product needs and often specialized contracts. As Verizon notes, a carrier that might compete for a localized business customer might not be able to compete for a multi-location national account. Conversely, a competitive carrier that could and might well choose to bid for a multi-location, multi-state, multi-year contract worth tens of millions of dollars in revenue is not necessarily interested in, or even capable of, serving a mid-sized business that needs a few DS1 circuits at a single location. Thus, a price increase by a hypothetical monopolist in the mid-sized business market would not be offset by competitors in the large business or mass markets entering this market.

Moreover, again as Staff recognizes,[15] the mid-sized business user market has product substitutes, if any, only within the product market for wireline telephony. No other technological substitute exists to prevent a hypothetical landline monopolist from successfully raising price for this customer class and service.[16] As Staff recognizes, wireless services and new technology like VOIP are not timely, likely or sufficient competitive alternatives for DS1-level and above loops.[17] Thus, because there are no intermodal competitive alternatives to these

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14 DS1-level access facilities not only include DS1 circuits, but also DS0 circuits used to provide xDSL services with DS1-type speeds, features and support to mid-size businesses.

15 White Paper at 31.

16 Verizon's pricing of special access facilities, discussed below, confirms this point.

17 As Staff correctly notes, most office buildings are not "cabled-up" and hence cable is not an effective substitute at the DS1 and up level. White Paper at 31. Moreover, to use another simple example, a single wireless phone may be able to be a substitute for a home telephone line (although it is questionable whether it is an adequate substitute for a family or even whether multiple phones are), but 250 individual cell phones are not an effective substitute for a business telephone system serving 250 office employees. And, of course, many DS1 circuits transmit data and few if any firms rely on wireless technology to carry their commercial data.

wireline circuits capable of constraining excessive pricing, retail competition in the mid-sized business market comes from CLECs if it comes at all. In turn, the largest and most ubiquitous CLEC competitors are AT&T and MCI.[18]

While Verizon may claim only a limited ability to compete for the national and multi-national enterprise market, it can make no such claim for the local, mid-sized business customer in New York that is served by only a few DS1 circuits at a single location. If the HHI for the "enterprise market," defined to include both Verizon's "regionally focused business" and the "top most portion of the national enterprise market" that Verizon claims it doesn't yet serve, exceeds 2,900, then the HHI for the mid-sized business market alone must be substantially higher as a matter of simple arithmetic. Combining the mid-sized market and the large business market into a single category, therefore, understates Verizon's overwhelming competitive dominance in the mid-sized market. It also understates the significant role that MCI plays as a direct retail competitor of Verizon in this market.

IV. STAFF HAS CORRECTLY FOUND THAT WHOLESALE TRANSPORT AND LOOP MARKETS WILL BE ADVERSELY AFFECTED BY THE MERGER

Staff's analysis of the transport market is complex, sophisticated and compelling. Its conclusions that the "proposed merger substantially reduces the number of competitive transport routes" -- even the most competitive -- is certainly correct. Indeed, among the most impressive of the Staff's findings is just how great a role MCI (and AT&T) played in the FCC's TRO and TRRO route analysis. The Staff's calculations show high levels of pre-merger market concentration even in the TRRO trigger routes (HHI of 2,077). But post merger, that HHI

18 Staff states: "The initial results of Staff's investigation confirm that AT&T and MCI are major players in the NY enterprise market." White Paper at 27.

increases by an extraordinary 1,410, again dwarfing the 100 index point increase that would warrant a presumption of increased market power. The loss of MCI as a competitor is, thus, a very substantial loss.

Staff, in a finely crafted parsing of the data, also disproves the Verizon-MCI contention that there is little transport overlap between the two merging entities, finding that in nearly 70% of the TRRO triggered routes, some combination of Verizon, MCI, AT&T and SBC are the only transport providers.[19] Staff therefore properly concludes "the level of overlapping transport facilities and the concomitant lack of additional transport providers on some of these routes with overlaps, indicates a significant anticompetitive impact of the merger(s) upon the New York transport market."[20]

Staff also is to be commended for carefully parsing out the consequences of the merger on special access circuits and high capacity loops, both directly and indirectly impacting the transport and loop market. The point here, as Staff properly recognizes, is that increased concentration in the local loop market will have spill over effects on both transport and special access. Thus, Staff correctly finds that "the acquisition of the second (MCI roughly tied for second place with AT&T) largest provider by the largest provider of high capacity loop access services (Verizon) will significantly increase market concentration in the transport and special access markets."[21]

This linkage is confirmed by price data. Verizon sells special access circuits both at retail to end user customers and at wholesale as loops and transport to CLECs and others. If

19 White Paper at 36. Although we are not privy to the data that Staff has reviewed, we would expect that SBC plays a relatively small role in that calculation, and that the combination of Verizon, MCI and AT&T largely defines the level of competitive choice in each of these transport routes.

20 *Id.*

21 *Id.* at 44.

the market for high capacity loops and transport were subject to effective competition, Verizon's prices for these special access circuits would be responding to market pressures. They would be moving inexorably in the direction of their forward looking costs and they would be moving inexorably in the direction of the prices that Verizon's largest competitors -- MCI and AT&T -- charge in directly competitive situations. Neither is the case.

The FCC has recently initiated a new proceeding to investigate the pricing of BOC special access facilities.[22] In the NPRM, the FCC reiterated that, in its 1997 Access Charge Reform Order, it stated "that it would rely on competition as the primary method for bringing about cost-based access charges."[23] The FCC also reiterated that "to the extent that competition did not fully achieve the goal of moving access rates toward costs, the Commission reserved the right to adjust rates in the future to bring them into line with forward-looking costs."[24] Later in the NPRM, the FCC summarized the results of that reliance:

> The first full year of the CALLS plan and the first year that price cap LECs exercised significant pricing flexibility was 2001. ARMIS data show that, in the 2001-2003 period, BOC special access operating revenues, operation expenses, accounting rates of return, and the number of special access lines increased annually (i.e., compound annual growth rates over the period) by approximately 12, 7, 17 and 18 percent respectively. BOC special access average investment decreased at a compounded annual rate of less than one percent over the same period. The overall (i.e., not compounded annually) BOC interstate special access accounting rates of return were approximately 38, 40, and 44 percent in 2001, 2002, and 2003, respectively.[25]

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22 In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking (released January 31, 2005) (henceforth "Special Access NPRM").

23 *Id.* at ¶13.

24 *Id.*

25 *Id.* at ¶27 (footnotes omitted).

These are rates of return on embedded costs. Rates of return on forward-looking costs would be significantly higher, and compounded rates, obviously, much higher still. This is not a description of an effectively competitive market. Nor, with year over year increases in rates of return, is it evidence of a market that is moving in the direction of greater competitive pressure on price.

As Staff recognizes, MCI and AT&T have been both Verizon's largest retail competitors and its largest wholesale competitors in the high capacity loop and transport market. And in doing so, MCI and AT&T have sold loop and transport circuits at rates far below Verizon's special access rates. Data collected by various CLECs consistently demonstrate that, in competitive bid situations, MCI (and AT&T) are by far the most frequent bidders against Verizon, especially in offering critical on-net circuits. In New York, data confirm that MCI responses to bids for transport facilities are usually 50% to 80% below Verizon's wholesale rates. Moreover, these same data show that when both MCI and AT&T bid, buyers are much more likely to get prices approaching marginal cost. This means that the loss of either competitive firm from the wholesale market removes a competitive price point that affects the pricing of the other. In short, even if AT&T were to remain a wholesale competitor in New York, the removal of MCI from the competitive picture would reduce pricing pressure on AT&T, permitting it to increase its wholesale price to levels approaching Verizon's special access rate. Of course, if, as we expect, AT&T diminishes its role as a wholesale provider in New York, CLECs, and their retail customers, will be further directly and adversely affected.[26]

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26 In reality, a further near certain impact of the combined mergers will be an increase in mutual competitive forbearance and thus a further anticompetitive consequence. MCI's departure from the wholesale loop and transport market in New York reduces SBC/AT&T's ability to buy facilities to compete against Verizon from anyone other than Verizon The converse occurs in SBC territory. Under these conditions, the mergers do not assist Verizon's ability to compete in the mid-sized business market outside of

V. IF THE COMMISSION IS TO APPROVE THE MERGER, IT MUST ESTABLISH CONDITIONS THAT FULLY OFFSET THE COMPETITIVE HARMS THAT THE MERGER WILL CAUSE

As Staff has found after extremely careful analysis, the proposed Verizon/MCI merger has significant anticompetitive consequences in both the retail market for mid-sized business customers in New York and in the wholesale loop and transport markets that its competitors use to acquire facilities to compete for mid-sized business customers at retail. The result is a double whammy of anticompetitive impact.

Staff concludes that conditions must be imposed on the merger to offset these consequences. Further, Staff provisionally concludes that: "a direct retail based remedy is not required" because it would be "preferable to ensure reasonable retail enterprise market competitiveness by focusing on the terms and conditions associated with wholesale offerings" that are used by "competitive carriers" seeking to compete with Verizon/MCI in the retail enterprise market.[27] Provisionally, CCG agrees. However, this approach works if and only if the terms and conditions relating to wholesale offerings imposed on the merger are adequate to enable the "competitive carriers" to be an effective competitive force at retail and, more specifically, a force adequate to compensate for the loss of MCI as a retail competitor.

Hence, Staff asks two central questions:

1. Whether addressing the wholesale markets adequately protects enterprise customers?

Verizon's home footprint and it does not assist SBC's ability to compete in New York. This set of conditions-- joined with the fact that Verizon and SBC earn supranormal returns on special access services -- incents rational businesses to engage in mutual competitive forbearance. This is not merely a matter of theory. Concrete data in the Greenwich, Connecticut area shows that Verizon and SBC do not compete against one another at the DS1 level and above even where directly facing each other in a small geographic region.

27 White Paper at 33.

2. Do the remedies proposed for the transport and special access and high capacity loops adequately address the issue?[28]

These are the right questions, and they warrant the same rigorous care that the Staff has given to its analysis of the merger's anticompetitive consequences. Moreover, Staff has also correctly defined the touchstone of any such analysis:

> If there is a finding that either of the mergers increases concentration in any of the markets that have been analyzed, specific remedies, where possible should offset the anticompetitive harm identified in the analysis.[29]

Hence, to answer Staff's specific questions we must return briefly to summarize those harms. The Staff's analysis demonstrates both a direct competitive harm through the loss of MCI as a retail competitor in the mid-sized business market and a direct harm to wholesale loop and transport competition that causes an indirect harm to retail business customers. To "adequately protect enterprise customers" wholesale remedies must offset *both* types of competitive harm. Hence, it will not be sufficient to establish rules that simply offset the loss of MCI's wholesale service offerings (and their attendant effects on wholesale competition and price). If the merger conditions leave the remaining CLECs in the same competitive condition that they are in pre-merger, but do nothing to offset the loss of MCI as a retail competitor, retail business customers will be materially worse off than they are today. To offset the harms caused by the loss of MCI as *both* a wholesale and retail competitor, the Commission must establish conditions that both allow CLECs to compete effectively and to have a reasonable opportunity to expand into the retail competitive space being exited by MCI. Anything less will fail to satisfy

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28 *Id.*

29 *Id.* at 12

the Staff's criteria of using wholesale market regulation to fully offset the anticompetitive effects of the merger and thereby protect retail customers.

The objective is, therefore, to secure viable wholesale competitive conditions that will allow the maintenance of retail competition between Verizon and others across the Verizon footprint in roughly the same fashion that exists today, with MCI in both the wholesale and retail markets. Satisfying these requirements is not, in fact, difficult. Essentially it requires the Commission to impose only a limited set of conditions that are designed first, to fix commercially reasonable rates, terms and conditions for wholesale loop and transport facilities, second, to stabilize those rates, terms and conditions for a commercially reasonable period of time, and third, to insure a "last look" at the end of the time period to make sure that events do not warrant further Commission action. These conditions are achievable by only limited modification of Staff's own provisional proposals. Below, we address those proposals and our suggested modifications.

Proposal 1: After the merger, should MCI be required to provide smaller carriers the same rates terms and conditions for wholesale services that it provided pre-merger, or which are currently tariffed or offered under SPAs, for a period of 36 months from the date of the merger?[30]

The Staff proposal is both ambiguous and problematic. First, it presumes that MCI will remain an independent service provider after the merger or that, at the least, Verizon will operate a kind of MCI-shell for the wholesale market. However, there is every reason to expect that MCI will not remain an active competitive force post-merger, and will not, in fact, exist at all. Attempts to compel Verizon to continue MCI's business plan, is neither economically nor administratively viable.

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30 Staff raises the same questions for transport facilities and high capacity loops. We address both loops and transport here since our answers are the same.

Economically, to fully offset the merger's anticompetitive effects, business customers must be assured that CLECs have the opportunity to "fill the gap" caused by the loss of MCI as a retail competitor. We presume that MCI's wholesale on-net footprint is geographically more limited than MCI's retail footprint for the DS1 and greater market in NY.[31] Limiting the availability of the MCI wholesale loop and transport services to the current MCI *wholesale* on-net footprint would not enable CLECs to offset the loss of MCI's retail competitive impact across its retail footprint.

Further, of course, the approach is static while the loss of MCI is not a static loss. It is worth noting in passing that, while Verizon/MCI have insisted that MCI was irrevocably committed to exiting the mass market, it has made no such assertions about MCI's plans for the mid-sized business market or the wholesale market. Indeed, MCI was and remains an active competitor in both markets. And, of course, were MCI to be acquired by a firm other than Verizon, MCI might have expanded its transport service offerings aggressively. Fixing the remedy for the loss of MCI's competitive services to those that existed on the day of its acquisition ignores the fact that the market is losing a dynamic competitor.

Additionally, the proposal is simply not administratively feasible. It invites the kind of gamesmanship that Verizon displayed for so many years with respect to routine network modifications. Ordering Verizon to provision transport facilities wherever MCI would have (or had) done so pre-merger, would be an invitation to constant battles over where those routes are.

There is a simpler and more economically viable and appropriate remedy. As a condition of the merger approval, the Commission should require Verizon to provide to all

31 It is well recognized that MCI extends its competitive presence in the local wholesale market through the sale of Type II circuits, which usually rely at least in part on special access circuits obtained from Verizon. We believe this also supports our proposed remedy.

carriers DS1 and DS3 loops and transport and loops in all locations in the Verizon footprint where high capacity loops or transport UNEs are no longer provided under Section 251, subject to the rates, terms and conditions that MCI made available prior to its acquisition and departure from the market.[32] Even more simply, Verizon should offer this commercial arrangement, (as it offers special access) across its entire footprint as an alternative offering made without regard to the presence or absence of comparable UNEs. The higher price for these facilities would presumably incent CLECs to take UNEs where available, but neither the CLECs nor Verizon would be injured if a CLEC elected to take the new loop or transport offering notwithstanding the availability of a UNE alternative.

This is a fair and economically rational solution. First, MCI rates for high capacity loop and transport facilities are commercially offered rates.[33] A commercially negotiated rate between a non-dominant buyer and seller defines a market price and, through a long history of regulatory law, a "just and reasonable" rate. Indeed, it is precisely what Verizon has always argued should be the standard for its wholesale services. And, while MCI's transport and loop rates are far below Verizon's special access rates, they are materially above TELRIC rates. While it may be the case that MCI did not offer such rates throughout the entire Verizon

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32 Or even more simply, Verizon should offer this commercial arrangement, as it offers special access, across its entire footprint. Presumably, CLECs will not take the offer where UNEs are available because UNE rates are lower. A CLEC that wants the service even where UNEs are available, as with special access, need simply order.

33 Rates should be set for a five year period: a standard that Verizon itself has established as commercially reasonable in its "commercial agreements" to provide unbundled switching. MCI rates can easily be established from competitive bid data the CLECs in New York have. CCG's members are prepared to consider whether the rates, terms and conditions of such offerings should be tariffed, offered pursuant to commercial agreement or provided under some other arrangement. However, it is obviously essential that all of the applicable rates terms and conditions be understand and codified to insure that Verizon actually performs with the good faith efficiency that MCI did when it functioned as a bona fide wholesale provider.

footprint, that would be because of limitations on the scale of MCI's local network. Verizon has no such scale limitations and there is no economic reason why a transport or loop rate offered by MCI where its network facilities were present should not be adequate where Verizon's network facilities are present.

Such a pricing remedy would go far to mitigate the harm to the competitive wholesale market as a result of the elimination of MCI (and AT&T) as wholesale provides to other CLECs and as retail competitors of Verizon.

Proposal 2: Would the availability of standard competitive rates, terms and conditions contained in commercial agreements between Verizon and competitive carriers be an effective tool to ensure the competitiveness of the transport market? How could this be accomplished?

Would the availability of standard competitive rates, terms and conditions contained in commercial agreements between Verizon and competitive carriers be an effective tool to ensure the competitiveness of the special services market? How could this be accomplished?

Should Verizon be required to extend for 36 months from the date of expiration, any interconnection agreements with other carriers that are due to expire within 12 months of the merger?

The Telecommunications Act of 1996 imposes significant obligations on parties to negotiate and, if necessary litigate, rates, terms and conditions before state agencies. For the entire history of the Act, parties have spent millions of dollars in such regulatory proceedings. This was a substantial drain on all sides – as many statements by Verizon and other ILECs will confirm. However, for many years, there was some parity of resources because some of the CLECs had regulatory assets sufficient to counter the vast resources that the incumbent could bring to such proceedings. In New York and in many other states, AT&T and MCI took that leadership role.

As a direct consequence of their prospective acquisition by ILECs, MCI and AT&T have ceased to play this role, and the remaining CLEC community simply doesn't have the assets to sustain a defense against a well-funded series of regulatory attacks by Verizon. This invites Verizon to use the regulatory process itself for anticompetitive purposes. To insure the continued ability of CLECs to compete in the New York market following the conclusion of this merger and, presumably the SBC/AT&T merger, CLECs need a significant period of rate and contract stability, devoid of this massive litigation burden and expense. Hence, we propose that as conditions of the merger, Verizon agree that it will not challenge the existing rates for any UNEs or other regulatory rates imposed by this Commission pursuant to the terms of the Telecommunications Act (*e.g.*, hot cuts, collocation, NRCs, *etc.*) for a period of 5 years. This is also fair. The costs of telecommunications services are declining and the rates currently in place in New York were the result of a negotiated settlement between the parties that were set at a point between the rates that both Verizon and the CLECs thought were appropriate. Further, these rates would apply only where the terms of the Telecommunications Act and applicable FCC rules specify. Nothing in this provision would alter the availability of UNEs themselves.

The same objective of litigation avoidance and commercial stability must be applied to interconnection agreements. Most New York ICAs have expired and are in "evergreen" status. The Commission should required as a condition of this merger that Verizon agree that all current agreements can be reinitiated for a full term, subject only to a set of uniform contract amendments approved by the Commission (if necessary) following a brief, global arbitration, and that addresses only the changes of law arising out of the TRO and TRRO.

As a further condition to offset the anticompetitive consequences of this merger, Verizon should be required to recalculate the locations where Section 251 High Capacity loop, transport and dark fiber UNEs are provided, treating AT&T and MCI as non qualifying fiber-based collocators. In the *TRRO*, the FCC revised its UNE rules to eliminate the ILEC obligation to provide high capacity UNE loops where certain conditions are met, including the presence of four fiber-based collocators.[34] Similarly, high capacity and dark fiber UNE dedicated transport and loops were eliminated where certain conditions are met, including the presence of three or four fiber based collocators.[35] "Fiber-based collocator" was defined to include only carriers that are "unaffiliated with the incumbent LEC,"[36] i.e., to measure wholesale competition by determining whether multiple *non-ILEC* facilities-based competitors were in place. However, under the current rules, these "non-impairment" findings are arguably *permanent* even if wholesale competitors in the area are eradicated.[37] But Verizon engaged in an end run around this entire scheme by counting MCI as a fiber based collocator and relying on its presence to render certain wire centers as "non-impaired," and then almost immediately thereafter seeking to acquire MCI and *eliminate* its competitive presence. Thus, absorption of MCI and AT&T by the RBOCs wholly undermines the theoretical and factual underpinnings of the *TRRO* even before the FCC's new rules were published.

To remedy this situation, action must be taken to restore the availability of wholesale facilities in these areas at rates comparable to those which would have prevailed had MCI and AT&T continued to compete in the market. Verizon should be required to recalculate *prior to any merger decision* the locations where impairment for high capacity loops and high

34 47 CFR § 51.319(a)(4)-(5).

35 47 CFR § 51.319(d)(3).

36 47 CFR § 51.5.

37 For example, the *TRRO* rules state, "Once a wire center exceeds both of these thresholds, no future [DS1 or DS3] loop unbundling will be required in that wire center." 47 C.F.R. § 51.319(a)(4) and (5).

capacity transport exists without counting either MCI or AT&T as a qualifying fiber-based collocator for purposes of the impairment analysis.

Finally, just as it is appropriate to redefine those wire centers where no impairment exists to simulate the continue presence of MCI and AT&T as competitors, the caps imposed by the FCC on the availability of high capacity loops and transport should be eliminated. As part of the TRRO, again in part in misplaced reliance that a robust wholesale market would exist, the FCC placed a cap of 10 on the number DS1 unbundled loops and dedicated transport circuits that could be ordered to a building or on a particular route.[38] In addition, it capped dedicated DS3 transport at 12 circuits per route.[39] Verizon should be required to waive these caps to ameliorate the anticompetitive effect of the loss of MCI (and as alluded to above, AT&T) as meaningful participants in the wholesale market.

The combination of these conditions will allow CLECs to continue to operate in a commercially stable environment subject only to such changes in the law as may descend from Washington. The commercial agreement between Verizon and the CLECs that continues the MCI offerings would apply where UNEs are not available. These conditions impose no unreasonable burden on Verizon, but do allow CLECs to attempt to serve the market that MCI is exiting.

Proposal 3: Should the transport market-related retail and wholesale performance metric definitions be expanded to help identify and monitor the market concentration effects for the merger? Is there an enforcement or facilitation role for the Commission?

Should the special services market-related retail and wholesale carrier-to-carrier performance metric definitions be expanded to identify and monitor the market concentration effects of the merger? Is there an enforcement or facilitation role for the Commission?

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38 *See* 47 CFR. §§51.319(a)(4)(ii) and 51.319(e)(2)(ii)(B).

39 *Id.* at 51.319(e)(2)(iii)(B)

Obviously, the loss of MCI as a competitive service provider of wholesale services, reduces Verizon's limited incentive to provide high quality wholesale (or, indeed retail) services. The loss of AT&T would further exacerbate that problem. The proper solution to this may be wholesale performance metrics for loops and transport. However, a better solution may be performance standards in ICAs and/or in commercial agreements implementing the MCI service rates.

Proposal 4: Is divestiture of the MCI New York transport network a practical and viable alternative to offset the increase in concentration in the transport market related to the merger?

Should divestiture of MCI's New York fiber loop network be considered as a practical and viable alternative to offset the increase in concentration in the fiber loop network market related to the merger?

CCG believes that divestiture of MCI's transport or fiber loop network is not an issue that should be addressed by state Commissions. Asset divestiture is usually a remedy imposed by the Antitrust Division of the Department of Justice. We recommend that the matter remain there.

VI. CONCLUSION

The Staff has performed a substantial service in analyzing the competitive consequences of this merger in New York. It has found that the merger raises significant risk to the mid-sized business market and the wholesale loop and transport markets that are linked to it. These are markets of fundamental importance to the economy of the State of New York. As Staff has correctly concluded, this merger should not be approved without significant conditions designed to offset the particular anticompetitive consequences that the merger would surely cause. We have in these comments offered proposals that would address those concerns.

Respectfully submitted,

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