Before the
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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 No. 05-C-0237**
Joint Petition of SBC Communications Inc., AT&T Corporation, together with its Certificated New York Subsidiaries, for Approval of Merger.	))))))	**Case No. 05-C-0242**

COMMENTS OF CONVERSENT COMMUNICATIONS OF NEW YORK, LLC

In Response to the Staff White Paper

Introduction:

It is no understatement to suggest, as the Staff's Report does, that this particular proposed merger is taking place at a critical juncture in the development of the telecommunications market. The analysis in Staff's Report demonstrates convincingly that the proposed acquisition by Verizon of one of its largest competitors in New York is not only unprecedented but will surely create severe market concentration problems in several important retail and wholesale markets important to consumers in New York.

Conversent Communications of New York, LLC ("Conversent"), as outlined in our Initial Comments, is most concerned that the merger of Verizon and MCI, coupled with the merger of SBC and AT&T, will create dangerous levels of market concentration in the wireline communications markets for small and medium sized businesses. The Staff's analysis confirms this fear, by concluding that there will be unacceptably high market concentration *in each and every market analyzed*, including the small business/retail, enterprise/retail, enterprise-retail, transport-wholesale, and high capacity loop/transport market. The Staff's Report also points out that, contrary to Verizon/MCI's statements, the state of the record today shows very little, if any, inter-modal competition that is used by business customers to "cut the cord" of their traditional wireline services, that are almost exclusively provided over Verizon loops.[1]

Without intermodel alternatives, the only means for providing voice and internet access services to small/medium sized businesses is through leasing ILEC loop and facilities. All the hyperbole about other modes of service aside (such as VoIP, wireless and cable telephony), very few businesses in fact have *replaced* or *substituted* their wireline telecommunications services with through these other transmission technologies. Consequently, as Staff's report shows, facilities based competition for small to medium sized businesses can be expected to come, if at all, primarily from the competitive LECs.

However, to provision telecommunications to small and medium sized business, CLECs require access to Verizon loop and transport facilities. As Staff's report shows, the local transmission facilities provided by loops and transport are in almost every

[1] Conversent expects to supplement this conclusion through further analysis provided in response to the Commission's Notice for Comments in its Competition III proceeding.

circumstance controlled by Verizon, and this market dominance for loops and transport used to serve business customers will be even more highly concentrated after the merger.

Moreover, there is tremendous uncertainty and instability surrounding the ability of CLECs to obtain access to Verizon loops and transport transmission facilities upon rates that are cost based and upon terms that are just and nondiscriminatory. If MCI is to be absorbed into Verizon, and AT&T is to be absorbed into SBC, the difficulties in obtaining continued access to Verizon loop and transport facilities, through further litigation and arbitrations against an overwhelming entrenched multi-billion dollar incumbent, such as Verizon, will be substantial. Smaller CLECs simply will lose the assistance of the two largest CLEC advocates against Verizon in New York in arbitration and regulatory proceedings necessary to establish the rates, terms and conditions for both UNEs and for continued access to loops and transport where Section 251 UNEs no longer will be provided.

This problem should not be underestimated. Since the 1996 Telecommunications Act, the existence of some sort of balance of power and bargaining position between Verizon and AT&T (together with MCI) has formed the foundation for the largely private means for determining access to Verizon wholesale services – through interconnection agreement negotiation and arbitration proceedings, and resultant dispute resolution procedures, carrier-to-carrier forums, and negotiated metrics and performance standards. This scheme envisions new entrants fighting to enforce their rights against a much larger incumbent that controls access to last mile facilities, and to arbitrate if necessary, in order to establish terms of access that are just, fair and nondiscriminatory.

Unfortunately, the proposed mergers here destroy the fundamental assumption that there will be wholesale access arrangements derived through the interplay of companies (such as AT&T and MCI) with largely the same resources at their disposal. This paints a sobering picture when viewed within the context that, according to the ILECs latest data, facilities based CLECs have gained very little in terms of market share over the last two years, if viewed in terms of switched access lines.[2]

That is why Conversent views this merger – and potential remedies to mitigate anticompetitive harms – as a means to address the enormous resource imbalance and increased market power of the ILECs, such as Verizon, to increase CLEC costs of doing business, decrease CLEC service quality, and further decrease CLEC revenues. This resource imbalance, coupled with overwhelming market concentrations identified in the Staff's report, strongly suggest that the Commission insist that a combined Verizon/MCI agree to certain measures designed to provide remaining facilities-based CLECs with greater rate and network access stability, especially in markets such as the small to medium sized business market, where there is very little evidence of meaningful inter-modal competition to constrain Verizon's behavior.

As more fully described below in response to the Staff's tentative conclusions and proposed remedies, Conversent suggests remedies desired to stabilize the ability of CLECs to continue to obtain access to important network infrastructure required by CLECs in order to offer choice to customers. The Commission should, accordingly,

[2] See Trends in Telephone Service Report prepared by the FCC's Industry Analysis and Technology Division, Wireline Competition Bureau, April 2005 at www.fcc.gov/wcb/trends.html. (In Table 8.4, at page 8.8, ILECs' reported that on December 2002 CLECs used a total nationwide of 4,259,000 access lines without switching (or UNE-L) – and that figure only increased marginally to 4,290,000 as of June 2004.)

condition its approval of this merger on an agreement of Verizon/MCI to do all of the following:

1) Freeze existing TELRIC-based prices where Section 251 UNEs must still be provided;

2) Re-calibrate the list of wire centers where UNEs will no longer be required, by removing AT&T and MCI as "fiber-based collocators";

3) Establish a just and reasonable pricing structure to reflect true "market-based" prices for access to loops and transport facilities where Section 251 UNEs no longer are required (after re-calibration); and

4) Extend the terms for existing interconnection agreements for an additional 3-5 years from the date of the entry of the Order in this proceeding.

Retail Markets – Mass Market, Small/Medium Business Market, and Large Business/Enterprise Market

At the outset of the Staff's analysis, Staff broke out the retail markets into two broad categories – "mass market" (constituting residential and small business) and "enterprise" (constituting medium and large business). Conversent believes that a more nuanced analysis of this proposed merger should evaluate this merger as it impacts three discrete retail markets: 1) the mass market; 2) the small/medium sized business market; and 3) the large business/enterprise market. The reason for this is that each of these discrete customer groups have very different telecommunications needs and demand characteristics.

As for the mass market, Conversent believes that this market is made up largely of residential and single line business customers only. And, in legislation recently enacted in New York there is further support to limiting the mass market to just residential and single line business customers. For example, in New York Bill No. 2103-

B, the legislature has required the Commission to conduct a special study showing carrier change charges for "residential and single line business customers."

In proceedings at the FCC, related to developing new rules for inter-carrier compensation, a group of large ILECs and CLECs called "The Intercarrier Compensation Group," (made up of MCI, AT&T, SBC, Level 3, Global Crossing, Sprint, and others) also support limiting the "mass market" to primary residential, non-primary residential, and single-line business customers.[3] Conversent agrees with the ICF market analysis, and this also comports with the distinction set by the New York legislature, as noted above.

For these reasons, Conversent believes that the Staff should not lump "small business" into a "mass market" analysis.[4] Thus, for mass market purposes, Conversent suggests that the Commission treat residential and very small business customers that typically work out of the home with one business line as constituting the "mass market" for purposes of this merger analysis. Since Conversent does not serve residential customers, it has no comment on remedies that would be appropriate to mitigate harms to residential customers as part of this merger.

At the same time, on the other end of the spectrum, Conversent believes that there are large businesses, such as fortune 500 companies, that should be evaluated in this proceeding as "enterprise customers."[5] Again, Conversent does not compete for these

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[3] See ICF Plan, submitted as an Ex Parte Filing in FCC Docket No. 01-92, dated October 5, 2004, page 64, and found at page 130 at this link: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516492297 .

[4] Indeed, the Small Business Association views a "small business" as "an independent business having fewer than 500 employees." See www.sba.gov/advo/.

[5] Staff's Report appears to suggest that "enterprise customers" are "entities purchasing four or more business lines." Staff Report at pg. 27 and ft.n. 69. Conversent believes it is more accurate to say that

larger/enterprise customers, and thus we have no further comment on remedies required to mitigate the harms to this customer group. Since Conversent seeks to compete just for small to medium sized customers the remainder of these comments will be addressed to this specific retail customer category.

In any case, Conversent agrees with the Staff's analysis that competition for small and medium sized business markets were highly concentrated even before the merger request, and that the record is clear that Verizon currently dominates the voice market with greater than a 50% market share. Staff Report at 20 (citing statistics from the FCC's Local Competition Report as of June 30, 2004). Conversent also agrees with Staff that there is no significant inter-modal presence of independent VoIP providers (such as Vonage) for many customers in the small business market. Staff report at 22.

However, for most of the remaining small business market beyond the single line (typically home/business) customer, Conversent does not agree with Staff's notion that "these [VoIP] options represent an increasingly viable alternative to traditional wireline service." Staff Report at 22-23. Conversent intends to provide further analysis of this point in its reply to the Commission's comments in the Competition III proceeding.

Second, Staff is correct to disregard the use of VoIP in HHI calculations since the prices for VoIP must also include the cost of the broadband connection necessary to carry the VOIP service. When this cost is factored in, VOIP service is more expensive than most local and long-distance packages for traditional calling. As the FCC pointed out in its TRO proceeding, "although we recognize that limited intermodel competition exists due to VoIP offerings, we do not believe that it makes sense at this time to view VoIP as

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such entities are small/medium sized business customers and that "enterprise" customers should only be reserved for the very largest of business customer.

a substitute for wireline telephony." FCC TRRO para 39, ft.n. 118. This is even more true for business customers that have lower thresholds for poor service quality and where reliability is a key component of the service needs of the customer.

For all these reasons, to be more fully explained in our response to the Competition III proceeding, Conversent does not agree that VoIP at this time, represents an increasing "viable" alternative or substitute to traditional wireline services regarding small business customers with more than one access line.

As for Cable, Conversent also believes that for customers that are not residential and single line business customers (such as most small business customers) cable telephony over independent cable plant is not a realistic alternative either. The FCC agrees:

> Some incumbent LECs, nevertheless, argue that the Commissionshould reach similar conclusions about the state of competition in local exchange markets, particularly based on competition from cable companies. As discussed more fully below, we consider such evidence of competition from cable providers as part of our impairment analysis. Our review shows that cable companies predominantly compete in the mass market for broadband services throughout the country. **To the extent that they compete in other product markets, like the enterprise services market, such competition is evolving more slowly and in more limited geographic areas.**

TRRO 39 (internal citations omitted; emphasis added). Staff's analysis also recognizes the limits of cable as an alternative in the small business market, noting that

> many business locations are not wired for television in the way residential buildings are. Thus, business locations often do not have cable facilities in place which can be quickly upgraded for the provision of packet cable telephone services.

Staff Report at 41. Conversent agrees with this analysis.

Staff also correctly identified the fact that "cable telephone providers" also "rely on large part on Verizon special access circuits" and that Verizon's network "remains the 'middle man' in most carrier-to-carrier hand offs of local traffic between networks." Staff Report at 23, at ft.n. 56. Furthermore, for this reason, Conversent completely agrees with the following conclusion reached by Staff:

> Staff also believes that the telecommunications market transition to cable-based telephony is of little assistance to the enterprise market at this point in time since most small and medium-sized businesses are not "cabled-up" (i.e. current cable-based services are television rather than voice-driven) and larger businesses generally have T-carrier systems for their telecommunications needs, so there is no pressing requirement in this market for broadband services either.

Staff Report at 31.[6]

As for wireless, Conversent also agrees with Staff that wireless shares should not be included in the HHI calculations and that Verizon's claim of significant wireless substitution is greatly exaggerated. The available evidence suggests that wireless customers use cell phones as supplements, not total substitutes, for their wireline services, and this is especially this for small business customers who cannot afford a lesser quality degraded service quality problems and coverage limitations that exist with wireless service.

The same problem exists for wireless. Certainly small to medium sized companies make use of wireless services *as a supplement* to wireline services, especially for businesses that have mobile employees (such as construction workers). However, again, these services are used to supplement, not to replace, a businesses basic wireline provided voice and data services. As one expert recently described the wireless substitution situation at the FCC (in consideration of the Verizon/MCI merger) "Although 45 percent of all businesses surveyed in New Jersey used wireless services to

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[6] As noted above, Conversent also agrees that VoIP is simply not a competitive alternative for a company that requires the bandwidth and dependency of a T1 dedicated loop (or even for some DS0 voice and data loops).

make some of their local calls, the study found that only 'about one percent of businesses name wireless as their primary means of making local telephone calls."[7]

Staff's finding is also consistent with findings that the FCC recently made in connection with the merger between Cingular Wireless and AT&T Wireless. *In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations,* WT Docket No. 04-70, Memorandum Opinion and Order, FCC 04-255 (Oct. 26, 2004). There, the FCC noted that SBC and BellSouth had strong incentives to protect their wireline operations competition from their own wireless operations.

The FCC pointed out that Cingular's "strategies are influenced by SBC's and BellSouth's concerns about wireline revenues and access lines." *Id.* ¶ 243. The FCC found that Cingular "developed and marketed many of its wireless products and services to complement – and specifically not to replace – residential wireline voice services." *Id.* ¶ 244. Specifically, SBC, BellSouth, and Cingular developed a new category of products that integrated wireless and wireline features and functionality. *Id.* ¶ 244 n. 579. Verizon, of course, would have the same concerns as SBC and BellSouth about competition from its wireless operations eating into wireline access lines, access MOUs, and revenues. And, Verizon too has developed similar wireline/wireless integrated product offerings in likely response to those concerns.

For example, Verizon's "Freedom" plans offer local services with various combinations of long distance, wireless and Internet access services in a discounted

[7] Declaration of Susan Baldwin and Sarah Bosley, dated May 9, 2005, filed in the Verizon/MCI FCC proceeding, WC Docket No. 05-75, at pg. 49 (citing and quoting a survey entitled: "Local Business Telephone Service in New Jersey: A Survey of Small Businesses" conducted by the Eagleton Institute of Politics, Center for Public Interest Polling – at 11, ft.n.3)

bundle available on one bill. Verizon 2004 Annual Report at 20. Verizon also has introduced a new product, "iobi Home," which it describes as "a 'control panel' with a wide assortment of features that helps our customers manage *all* their communications services and devices." Verizon 2004 Annual Report at 7 (emphasis added). Verizon, therefore, is holding its wireless operations back from full competition with its Verizon wireline operations, much as SBC and BellSouth held back Cingular from full competition with their wireline businesses.

Furthermore, even if it is true that Verizon's wireline operations are losing customers and revenue to wireless, a prime beneficiary of that trend is Verizon itself. Analysts are quick to recognize that Verizon has gained significant revenue from its own Verizon's wireless operations. Comparing the most certain increase in Verizon's wireless subscribers to Verizon's claims of access line loss puts an end to any notion that Verizon is suffering from wireless competition.

Indeed, according to recent industry analysis, access lines are not an accurate measure of an ILEC's financial health, as Verizon is successfully gaining revenue and market share for data and wireless services that more than offset wireline access line loss.[8] Thus, Verizon's complaints about loss of access lines to inter-modal competitors does not give an accurate picture of the extent of inter-modal competition or of Verizon's financial health. The Staff's report, therefore, properly removes wireless as a substitute product in this retail market when examining this proposed merger.

As for other advanced services, such as emerging technologies such as Wi-Fi, while Conversent agrees with Staff's exclusion of these technologies in its examination,

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5. See "Reassessing the Impact of Access Lines on Wireline Carriers," Equity research report prepared by Raymond James & Associates, Inc., dated July 11, 2005 (attached as Exhibit "A").

Conversent does take issue with Staff's suggestion that there is "growing evidence" that "consumers increasingly view these new technologies as substitutes for wireline voice service," at least as far as small/medium businesses are concerned. Staff Report at 24. At most, all that can be said is that these technologies currently can be regarded only as *potential* threats in the future. As Staff correctly points out, "market concentrations, measured by HHIs, are traditionally calculated based on current data, not projected data." Staff Report at 24.

Small/Medium Business - Retail – Remedies

Conversent believes with Staff's preliminary conclusion that for most retail business customers, a "direct retail based remedy" will not solve the problem of concentrations in this market as a result of the proposed merger. Staff Report at 33. Rather, appropriate remedies must be assigned to the wholesale level protect against the harms of the proposed merger. Remedies must be crafted to protect the remaining source of competition for customers in this market – the CLECs. Accordingly, Conversent recommends the following remedies to address the adverse consequences of this proposed merger to small and medium sized business customers --

1) UNE Loop Rates: The Commission must insist on measures designed to stabilize CLEC access to bottleneck facilities, so as to prevent costly and time-consuming wholesale rate proceedings. This can be accomplished by insisting that VZ/MCI agree to a UNE rate freeze for five (5) years from the date of the Commission's Order in this proceeding. This freeze should apply to UNE DS0, xDSL, DS1, and DS3 loops. Without such action a combined Verizon/MCI has enormous incentives to force the remaining few CLECs into complex and extensive rate proceedings, where AT&T and MCI, and their experts, will no longer be available to counter Verizon's rate increase proposals. Accordingly, Section 251 UNE rates should be capped at the rates in place as of today for a period of 5 years;

2) UNE Loop Terms of Service: The Commission must stabilize the ability of the remaining CLECs to provide voice and data services over UNE loops

(such as UNE DS0, xDSL, DS1, and DS3 loops), used by small and medium sized businesses. The Commission should prevent a combined Verizon/MCI from continuing to use their combined businesses to further erode the ability of customers to obtain competitive services over Verizon UNE loops.[9] To accomplish this, the Commission should require the petitioners to agree to allow continued access to all such UNE loops to provide all voice and data/internet services that exist today, upon the same terms and conditions and without regard to any change of law, during a period of 5 years from the date of the final Order in this proceeding.

3) Re-Initialize Interconnection Agreements: In order to continue to offer competitive services to small business customers the remaining CLECs will need stability in terms and conditions that will govern their access to UNEs required to serve end user customers. Without AT&T and MCI available to arbitrate a new interconnection agreements the remaining CLECs remain vulnerable to costly and time consuming litigation in order to arbitrate new agreements. Consequently, the Commission should allow all agreements that have initial terms that have terminated to be **re-initialized for a period of 5 years from the date of the Commission's Order** in this proceeding.[10]

4) Recalculate the List of Impaired Wire Centers for High Capacity Loops: Verizon relied on the presence of MCI and AT&T as "fiber-based collocators" for purposes of obtaining Section 251 unbundling relief in the TRRO proceeding. The integrity of these factors are called into question by this proposed acquisition. Accordingly, Verizon should be agree to re-count its list of wire centers as a condition of this merger by excluding MCI and AT&T as "fiber-based collocators" and to then publish the new list of inquired wire centers in its UNE tariff.

[9] One recent example is the blatantly discriminatory "no facilities" policy used by Verizon to force CLECs to purchase much higher priced special access services where loops require only "routine network modifications." The Commission correctly has signaled its intent to stop this anticompetitive practice. Still, the Staff recognizes that the "concept of 'raising rivals' costs' in this situation includes anti-competitive acts such as delaying provisioning and repair intervals, increasing prices, and erecting other barriers to entry which are costly to overcome." Staff Report at 34, ft.n.80.

[10] The Commission should not order the agreements to be extended from the end of the initial termination dates, since many of the agreements terminated by their terms several years ago, and are continuing on a month-to-month basis. The new term should therefore begin at the date of the Order in this proceeding.

Transport-Wholesale

Conversent agrees with Staff's analysis that

> the level of overlapping transport facilities, and the concomitant lack of additional transport providers on some of those routes with overlaps, indicates a significant anticompetitive impact of the merger(s) upon the New York transport market." Staff Report at 36. The problem with the creation of dangerous levels of market power are seen in the fact that, of the 487 intraLATA transport routes identified by Staff using the TRO and TRRO wholesale provider test, approximately 70% of these routes have only "some combination of the four merged partners.

Staff Report at 35-37. The problem, however, is even greater. As Staff recognizes, merely assessing whether a company has fiber based collocation at a Verizon wire center does not necessarily mean that that company finds it economical to provide wholesale transport services to customers, and the Staff's analysis confirms this. Id, and at ft.n. 83.

Put another way, the existence of a fiber-based collocation does not mean there exists facilities based competition in fact for particular customers. For these reasons, Conversent agrees with Staff's conclusion that the proposed merger, taken together with the proposed SBC/AT&T merger, will lead to unacceptable levels of market concentration in this wholesale transport market.

Transport - Remedies

> Staff question (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?"

Conversent, like most smaller CLECs, purchases most of its inter-office transport from Verizon, or from third-party vendors. Where third party transport is available Conversent uses it – however, in many cases, as revealed by the Staff's analysis, there are no alternatives but for Verizon. Conversent agrees that where MCI's rates, terms and conditions are more favorable than Verizon's current rates, terms and conditions for wholesale transport, that Verizon should agree to make these more favorable MCI rates, terms and conditions available to all CLECs, along all Verizon routes, as an option.

Again, because pre-merger, and even more after the merger, since Verizon facilities will be the only option for smaller entrants who seek to serve customers, the availability of even basic wholesale transport arrangements as UNEs at existing TELRIC prices, terms and conditions as exists today must be joined with any wholesale remedy established to protect smaller competitors (and ultimately end users) from price gauging by a combined Verizon/MCI. As with access to loops, where UNEs are available today the Commission must require the petitioners to agree not to take efforts to further erode the ability of competitors to obtain access to UNE transport where necessary.

Moreover, given that Verizon (and SBC) used the presence of MCI and AT&T fiber-based collocation arrangements to vastly limit the routes where competitors are not "impaired," only to then buy up these facilities through these proposed mergers, the Commission should also require Verizon to re-calibrate the routes for which UNE transport will be available at TELRIC prices, without the use of MCI and AT&T as "fiber-based collocators."[11]

As with continued access to loop remedies, described above, the Commission should condition its approval of this merger on an agreement by Verizon/MCI to maintain existing UNE prices, terms and conditions as exists today for at least a period of 5 years, regardless of any changes to law. Where UNEs are no longer available for high

[11] There is no possibility of seeking such relief from the FCC, given that the TRRO rules appear to prohibit any future re-counting of wire centers. See 47 C.F.R. 51.319 (a)(4) and (5)("Once a wire center exceeds both of these thresholds, no future . . . unbundling will be required in that wire center.")

capacity transport, Conversent recommends that Verizon/MCI agree to provide a just and reasonable alternative rate that reflects a "just and reasonable" market based rate.

> Staff Question 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?"

Verizon's existing rates, terms and conditions in existing so-called "commercial agreements" are not likely to reflect a realistic "competitive" rate where Verizon exercises dominant market power in the wholesale transport market, as the Staff correctly concluded, and for this reason alone merely substituting such rates, terms and conditions will not in any way substitute for just and reasonable market based arrangement.

Accordingly, the price for wholesale transport where UNEs will no longer be available should be a "just and reasonable" prices. The Commission should not use rates set in so-called "commercial agreements" that exist between Verizon and other carriers. In many cases, under threat of UNE elimination, CLECs were forced to enter into agreements with Verizon. These were likely a "take it or leave it" arrangement – hardly a sufficient proxy for use as substitutes for a true market pricing in a competitive market.

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

Because of the excessive concentration of market power in the wholesale transport market expected if this merger is approved, the Commission must be vigilant in monitoring the wholesale performance and quality of service offered by Verizon to wholesale competitors. The Commission should expand the metric definitions to identify that not just Section 251 UNE transport performance will be measured but all forms of wholesale transport services provided to CLECs will be measured, with meaningful penalties for poor performance.

> Staff Question # 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?"

Conversent takes no position on this question.

Special Access and High Capacity Loops – Retail and Wholesale

As indicated in Conversent's Initial Comments, Conversent agrees with Staff's tentative conclusion "that the acquisition of the second (MCI is roughly tied for second place with AT&T) largest wholesale provider by the largest provider of high capacity loop access services (Verizon) will significantly increase market concentration in the transport and special access markets." Staff Report at 44. Conversent further agrees with Staff's conclusions that 1) the merger will reduce Verizon's incentive to enter into contracts with smaller carriers on favorable terms; and 2) the merger could affect business customers by potentially increasing T1 prices and/or cause deterioration of retail service quality. Staff Report at 44.

In particular, while Staff did not calculate HHIs for this market (special access/high capacity loop market), of the high capacity loop market in New York a GeoResults, Inc. analysis, dated June 24, 2005, reveled that the HHIs for all lit buildings with bandwidth demand of at least a T1 level in New York City alone were 6,243 pre-Merger, and 6,663 post merger. (See attached Exhibit "B") According to this analysis, the market share currently shows Verizon with 78.8% of market share of lit buildings with T1 level demand in New York City, and MCI with only 2.7% (and AT&T with 4.8%). Id. The HHIs are also highly problematic even in lit buildings with bandwidth demands at higher (T3 and at least OC3) levels as well, with Verizon having a market share approaching 70% in these buildings (and corresponding HHIs approaching 5000). Id.

This analysis confirms that little has changed since the Commission's last Special Access Market report in 2001, where the Commission concluded that "Verizon represents a bottleneck to the development of a healthy, competitive market for Special Services . . . Accordingly, we find that a competitive facilities-based market for Special Services has yet to emerge and that Verizon continues to dominate the market overall. " Staff Report at 43-44 (citing Commission's analysis in 2001).

It is also important to emphasize that while these customers are enterprise customers with more sophistication than most mass market customers, the Commission still has an obligation to ensure that rates and quality of service is just and reasonable for all consumers – including business customers. For businesses, telecommunications is a major component of the operation of the New York economy. If New York business customers are likely to find less choice, and the potential for price hikes and poor service quality, as a result of this proposed merger, then the Commission needs to take action to prevent these economic harms in its review of this merger.

That is why the remedies to account for the overwhelming market power remaining with a combined Verizon/MCI must seek the agreement of the petitioners, as a condition of the merger, to engage in continued efforts to assist facilities-based CLECs with continued access to high capacity loop and transport facilities at just and reasonable rates and with nothing short of excellent levels of service quality.

Special Access/High Capacity Loop/Transport -- Remedies

> Question No. 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?"

Where UNEs are no longer available, access to the local loop and Verizon/MCI transport network will still be critical to the ability of CLECs to compete at any level in this market. Verizon controls such a high degree of market power in this market precisely because of the very high economic and social cost to replicate verizon'd exisiting high capacity transmission facilities. Continued access to various high capacity transmission facilities is by no means certain, Verizon continues to advocate to avoid providing even UNE access under Section 251 of the Telecommunications Act.[12]

Also, where UNEs are no longer required, as a result of the FCC's recent TRO and TRRO, merely substituting Verizon's existing special access pricing is inappropriate. As AT&T points out in its recent filing at the FCC, Verizon's special access pricing is highly inflated and likely reflects excessive monopoly pricing.[13] All these problems will only be exacerbated with the elimination of even the faintest outlines of an alternative wholesale loop and transport market, reflected in potential use of existing MCI (and AT&T) facilities. For all these reasons, the Staff is justified in being concerned with access and reasonable pricing for continued wholesale access to Verizon high capacity loops and transport facilities where UNEs at TELRIC prices are not required.[14]

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[12] Verizon, and other ILECs, have appealed the FCC's TRRO rulings related to high capacity loop and transport UNEs, and are again seeking to have these FCC unbundling rules vacated.

[13] AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10595 (filed October 15, 2002).

[14] Verizon, and other ILECs, are also arguing that Section 271 obligations to provide access to loop and transport facilities is not required where the FCC has granted Verizon unbundling relief from Section 251 UNEs. See Petition for Forbearance of SBC Communications, Inc., WC Docket No. 03-325 (filed Nov. 6, 2003)

To correct for this economic harm, the Commission should require that Verizon agree to stop its continued assault on CLECs ability to providing wholesale access to high capacity loop and transport facilities by specifically conditioning this merger approval on Verizon/MCI's agreement to provide wholesale special access loop and transport prices (where Section 251 UNEs are no longer provided) at rates that reflect "just and reasonable" prices based on what would be charged in a competitive market for special access services.

If one of the goals of regulation is to seek to emulate the results that prevail in competitive markets then merely substituting rates used in Verizon's over-priced and excessive special access pricing should never be allowed to exceed rates found in a comparable competitive market. In order to account for the elimination of MCI (and AT&T) as competitive alternatives for loop and transport services the rates, terms and conditions where MCI offered customers a competitive alternative (in response to RFPs or bids from customers) should be made available to smaller CLECs.

As an alternative, since both AT&T and MCI likely have obtained much more favorable special access rates, based on volume and term discounts that are not available to smaller CLECs, as a condition of this merger Verizon should agree that it will offer smaller CLECs the most favorable rates, terms and conditions that either AT&T or MCI were provided for Verizon special access services, for all locations or routes where Section 251 UNEs will not be provided.

> Staff Question # 2: "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 Staff is on the right track here as a further means to ensure continued stability upon terms that exist in operative interconnection agreements. As pointed out above in the retail market-remedies comments, all the CLEC agreements in place in New York (of relevance to Conversent) today have already expired upon their initial terms, and are operative now on a month-to-month basis. Thus, the Commission should required Verizon/MCI to agree to extend the operative dates of these existing agreements for at least 5 years from the date of the Order in this proceeding. This is important to prevent a combined Verizon/MCI from leveraging market dominance into forcing smaller CLECS into costly and time-consuming contract arbitration proceedings.

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

Because of the excessive concentration of market power in the wholesale transport market expected if this merger is approved, the Commission must be vigilant in monitoring the wholesale performance and quality of service offered by Verizon to wholesale competitors. The Commission should expand the metric definitions to identify that not just Section 251 UNE transport performance will be measured but all forms of wholesale transport services provided to CLECs will be measured, with meaningful penalties for poor performance.

> Staff Question # 4: "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?"

See Conversent's response to question # 1 above.

> Staff Question # 5: "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?"

Conversent understands that divestiture of assets is a common remedy applied as a structural remedy to mitigate anticompetitive consequences of a merger. As long as the Commission imposes the conditions recommended above, Conversent will leave it to others to articulate the benefits that could be obtained from a divestiture remedy.

Retail Service Quality

Conversent agrees with Staff that service quality is a serious concern in such a merger review. However, particularly concerning the small to medium sized business customers Conversent agrees with Staff's tentative assessment that competitive alternatives, that could in theory act as a check on Verizon's service quality, are not universally available. Staff Report at 50. Where there remains a lack of intermodal alternatives Conversent agrees with Staff that a "service penalty rebate" plan would be appropriate. Staff notes that the identification of the areas of limited competitive choice is under review in the Comp III proceeding, and Conversent intends to provide further evidence and comments in that proceeding to address this important question on the degree or not of inter modal competition in the small to medium sized business market.

For example, the Staff has suggested that, where there is little competitive option available, that a framework should be considered "that would limit Verizon's ability to increase rates in areas where neither a competitive nor a service quality gateway is passed." Where Verizon does not face sufficient competition to constrain its service quality provided to customers the Commission should consider greater regulation of Verizon's retail service quality as a means to discourage poor service quality.

For example, Verizon's poor response time in repairing even its own retail customer's xDSL service problems suggests that there is not adequate competition in most places to constrain Verizon's behavior. In a six month period, running from April to September 2004, Verizon's retail MTTR its own customer's troubles on 2-Wire xDSL loops was consistently in the 30-35 hour range.[15] Especially for small business customers that rely on xDSL for important aspects of their business, a service outage that lasts almost two days represents a serious and unacceptably long delay.

This suggests that, contrary to Verizon's rhetorical assertions that it faces robust intermodal competition from cable, for many xDSL customers there no alternative supplier as a means of disciplining Verizon's poor service quality. If there really were true competition from other intermodal carriers a customer would not tolerate service outages approaching 2 days and would likely abandon Verizon xDSL service for other broadband access demands. The fact that Verizon thinks that it need not improve on long service outages is strong proof that it faces no real competitive threats for xDSL customers, particularly as merges smaller business customers.

Thus, where the Commission finds that intermodal competition does not constrain Verizon's poor service quality it should continue to impose service quality standards and penalties, as a condition of this merger, as a means to induce better retail service quality (which, given the parity metric standard, should also induce better service quality to CLEC customers as well).

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[15] See NY C2C reports for UNE Maintenance – MTTR 2 wire xDSL metric MR-4-02-3342.

Wholesale Service Quality

Conversent agrees with Staff's conclusion that "[a]bsent carriers having the size and resources of AT&T and MCI, the remaining CLECs will be hard pressed to assemble the resources required to address any wholesale shortcomings resulting from substandard wholesale shortcoming resulting from substandard wholesale service quality." Staff Report at 55. Staff's analysis also correctly identifies the "heightened vulnerability" that business customers will face for high capacity circuits "given the lack of cable based alternatives currently available to them." Staff Report at 55. Finally, Conversent agrees with Staff that the merger can be expected to create less incentive for Verizon to provide good wholesale service quality. Id at 56.

Wholesale Service Quality Remedies

> Staff Question # 1: "Should MCI's service quality performance be reported separately in carrier-to-carrier reporting?"
>
> Conversent is not privy to how Verizon intends to separate out functions and services with a combined Verizon/MCI and cannot offer any more comment at this time.
>
> Staff Question # 2: "Should service quality performance be reported to Staff for wholesale products and services purchased by a carrier through commercial agreements?"
>
> Yes. Verizon should not be allowed to exert its dominant market power leverage to deny CLECs with service quality performance arrangements where the CLEC purchases service through a commercial agreement.
>
> Staff Question # 3: Would future commercial and interconnection negotiation processes and resultant agreements benefit from an expanded list of collaborative developed wholesale special service and high cap metrics to draw from? How will adequate and nondiscriminatory service performance be enforced?"
>
>> Yes. There should be more evaluation of exactly what special service and high cap metrics should be developed in a market where there is rapid

> consolidation into an even bigger company than before the merger. In order to ensure that there is adequate and nondiscriminatory service the Commission should re-evaluate the existing methods of measuring weather Verizon provides "parity" service to CLECs.

Staff Question # 4: Does the Commission need to implement a process to ensure the integrity of the reporting systems for transport and special services?"

> Yes. The current system of reporting is largely controlled by Verizon and involves a metric evaluation system that is impossible for CLECs to replicate. CLECs are forced to simply take Verizon's data/reports as they are. The Commission should explore methods of refining the reporting system to simplify the process and data analysis and to allow for 3rd party auditing on a regular basis.

Financial Issues

Staff's analysis here attempts to assess how this proposed merger affects the investment decisions and infrastructure plans of a combined Verizon/MCI. Conversent shares the concerns of several parties (such as the Attorney General and the Legislature and others) that there is a serious risk that Verizon will be spending capital on higher end fiber build projects, at the expense of its legacy copper and hybrid fiber/copper plant.

As pointed out above, in order for competition to grow in the small/medium sized business markets in New York, CLECs must rely increasingly on unbundled access to Verizon's legacy loop and transport network. The Commission must take steps to ensure that Verizon's service quality to this existing outside plant is not sacrificed in a rush to invest in new fiber based construction designed to serve only a discrete portion of the market.

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Respectfully Submitted

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