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 05-C-0237
Joint Petition of SBC Communications Inc., AT&T Corporation, together with its Certified New York Subsidiaries, for Approval of Merger	CASE 05-C-0242

COMMENTS OF PAETEC COMMUNICATIONS, INC.

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Comments of
PAETEC Communications, Inc.

PAETEC Communications, Inc. ("PAETEC"), by its counsel, hereby submits its comments on certain issues raised by Commission Staff in its July 6, 2005 White Paper issued in the above-captioned merger cases (the "White Paper").[1/] Specifically and as suggested by Staff in the White Paper, PAETEC submits that only through divestiture of critical assets necessary to preserve the pre-merger level of competition in the interoffice transport and special access markets can the inevitable, severely anticompetitive results of the Verizon/MCI merger be avoided.

I. INTRODUCTION

PAETEC is a successful competitive provider of local, long distance, data, and Internet services serving the New York City metropolitan area and the major upstate markets, as well as numerous other states. PAETEC is headquartered in the Rochester area and has created over 600 jobs in New York State. PAETEC has assiduously sought to avoid unnecessary regulatory entanglement since its inception. For instance, PAETEC does not utilize unbundled network

[1/] 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 Certified New York Subsidiaries, for Approval of Merger*, Department of Public Service Staff White Paper (July 6, 2005) ("White Paper").

elements ("UNEs"), opting instead to purchase commercial special access circuits that are more expensive, but provide more business certainty. PAETEC has ordinarily satisfied all of its business needs with incumbent local exchange carriers ("LECs") through commercial service offerings, and in doing so has for the most part avoided regulatory battles and contentious litigation. Unfortunately, the potential anticompetitive effects of the proposed mergers would be so pronounced that PAETEC is compelled to intervene in this proceeding in order to protect its rights and business.

As Staff recognizes in the White Paper and as further discussed herein, the anticompetitive effects of the proposed mergers are obvious. PAETEC is primarily concerned with those anticompetitive effects on two markets – special access facilities and interoffice transport facilities (which the White Paper refers to jointly as "Special Services"). Interoffice transport facilities are high-capacity circuits that connect two central offices. Special access facilities are high-capacity circuits that connect a carrier point-of-presence with a customer location.[2/] Staff noted that "a competitive facilities-based market for Special Services has yet to emerge and that Verizon continues to dominate the market overall."[3/]

What limited competition exists today in the special access markets comes from AT&T and MCI. Many of the competitive transport and special access services at issue are provided by MCI through its Metropolitan Fiber Systems of New York, Inc. ("MFS") subsidiary, and by AT&T through its Teleport Communications Group, Inc. ("TCG") subsidiary. As Staff also pointed out, "[b]oth AT&T and MCI provide not only alternative facilities, but they also provide discounted pricing arrangements for those facilities which are competitive with or significantly

2/ White Paper at 41.

3/ *Id.*

better than the terms or pricing arrangements that Verizon offers to many smaller carriers."[4/] Unfortunately, given the economic and financial realities of the competitive LEC world, neither the cost of deploying new special access facilities nor the competitive situation in the Special Services market will improve anytime soon. As Staff recognized, "[d]ue to the nature of these facilities, there are inherent barriers to building and deploying new local fiber facilities (e.g. cost, obtaining conduit space, rights-of-way, and access to buildings)."[5/]

In short, Verizon dominates the high-capacity special access and transport markets, and would exponentially increase its dominance over those markets by acquiring MCI's facilities. If the merger is approved without conditions, Verizon will control substantially all of the high-capacity network infrastructure in New York, with the second largest amount of network infrastructure being owned by another incumbent LEC (SBC). Staff put it best:

> In very simple terms, MCI and AT&T are Verizon's two largest wholesale market competitors in that they have the largest competitive facilities-based networks in New York state (excluding Verizon) for the competitive provision of transport and local transmission facilities. These existing networks are used to compete directly with Verizon for both wholesale and retail customers . . . Verizon's acquisition of one of two of its largest direct wholesale competitors has 'potentially anticompetitive consequences too severe to ignore.'[6/]

In the White Paper, Staff tentatively concluded that divestiture of critical assets necessary to preserve the pre-merger level of competition in the New York interoffice transport and special access markets is necessary to avoid the severe anticompetitive results that would otherwise flow

4/ *Id.*

5/ *Id.*

6/ *Id.* at 40.

from the proposed merger.[7/] (Throughout these comments, PAETEC uses the term "New York Special Assets" as a shorthand description of these assets.) For the reasons set forth below, PAETEC agrees that divestiture of the New York Special Assets is necessary. The evidence contained in the White Paper, these Comments, and other parties' filings at the Federal Communications Commission ("FCC") (as discussed below) also confirms the need for this relief.

II. THE PROPOSED MERGERS WOULD HAVE SEVERE ANTICOMPETITIVE EFFECTS ON THE INTEROFFICE TRANSPORT AND SPECIAL ACCESS MARKETS

The analysis of a proposed merger's anticompetitive effects begins with a definition of the relevant market or markets.[8/] In this case, PAETEC is concerned with two of those markets – interoffice transport and special access or high-capacity loops. PAETEC agrees with Staff that these are distinct markets, and believes that the definitions proffered in the White Paper are appropriate and supported by the evidence.[9/] PAETEC further agrees with both the Commission's and the FCC's view that in undertaking a competitive analysis of these markets, a route-specific inquiry is necessary.[10/] In any event, it is irrelevant whether this is one market or two because no matter how the market(s) are defined, the combined Verizon/MCI will have dominant market power. This leads to the inevitable conclusion that absent divestiture of the New York Special Assets, the ability of PAETEC and every other competitor to obtain

[7/] PAETEC is not familiar enough with the legal structure, business, or network operations of Verizon or MCI to specify, at this time, which assets or operating subsidiaries (*e.g.* MFS) must be divested to preserve competition in the interoffice transport and special access markets.

[8/] *Application of Worldcom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to Worldcom, Inc.*, 13 FCC Rcd 18025, ¶ 24 (1998).

[9/] White Paper at 33-34, 38-39.

[10/] *Id.* at 33.

reasonable and cost effective access to interoffice transport and high-capacity loops will be severely undermined.

In its *Triennial Review Remand Order* ("*TRRO*"), the FCC defined dedicated interoffice transport facilities as "incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers."[11/] This definition encompasses entrance facilities, which are those interoffice transmission facilities connecting a competitive LEC's network to the incumbent LEC's network. As discussed more fully below, the continued availability of entrance facilities is of particular concern to PAETEC.

Based on the record before the FCC in the *TRRO*, the FCC found that competitive LECs were not impaired absent unbundled access to entrance facilities, since entrance facilities are "widely available from alternative providers."[12/] PAETEC's position here is entirely consistent with the FCC's findings in the *TRRO*. In New York and most other states, AT&T and MCI are the only "alternative providers" on many routes. In fact, if the FCC were to revisit the entrance facility issue after the proposed mergers of Verizon/MCI and SBC/AT&T, it would likely reach a different conclusion regarding competitive LEC impairment for those critical facilities.

Indeed, the White Paper provided statistics confirming the effect that these mergers would have on the competitive availability of interoffice transport. Staff's analysis showed that 487 interoffice transport routes in New York were deemed "unimpaired" due to the presence of a

11/ *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 136 (2005) ("*TRRO*").

12/ *TRRO* ¶ 138.

sufficient number of "alternative providers" to satisfy the *TRRO*'s standards.[13/] In other words, interoffice transport need not be made available as a UNE on those 487 routes. On 337 of those routes, however, "some combination of the four merger partners are the only transport providers (69.2% of the 487 *TRRO* triggered transport routes)," and "Verizon, AT&T and MCI are the only transport carriers on 72 routes."[14/] Staff appropriately "believes 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."[15/]

The data and findings in the White Paper are confirmed by PAETEC's experience. PAETEC has conducted a limited internal survey of the competitiveness of the interoffice transport market on routes it utilizes in New York City – perhaps the most competitive market in the country. PAETEC found that on numerous routes even in New York City, Verizon and MCI were the only providers of interoffice transport (and there are numerous other routes that are served by only one other provider). Absent divestiture of the New York Special Assets, the combined entity will be the only entity providing interoffice transport on those routes, affording the combined entity unilateral ability to increase PAETEC's costs, either directly or through performance shortfalls.

Filings made by several parties in the FCC's merger proceeding suggest that PAETEC's experience in representative of the New York market as a whole. In those filings, a number of business customers, competitive LECs, and other new entrants provide information about the

13/ White Paper at 36.

14/ *Id.* (emphasis in original).

15/ *Id.*

interoffice transport and special access markets that parallels PAETEC's experience and buttresses the Staff's preliminary conclusions about the competitive harms to those markets from the proposed mergers, particularly the Verizon/MCI merger.[16/]

For example, Global Crossing provided a detailed analysis showing that special access (which Global Crossing defined as including both interoffice transport and high-capacity loops) is a distinct product market and that regulators must analyze the competitive effects of the merger on that market on both route-specific and regional bases.[17/] Global Crossing pointed out, as noted by PAETEC here, that for many customers in New York and throughout Verizon's region, MCI is the only alternative provider of special access, while for other customers it is one of very few alternatives.[18/] Broadwing and SAVVIS provided additional evidence that the merger will eliminate much of the limited competition existing in the special access market in New York and elsewhere, and will lead to even greater concentration in a market that currently enjoys only limited competition.[19/] Additional analysis regarding the anticompetitive effects of the Verizon/MCI merger on the special access market in general and certain New York submarkets was provided in a joint filing by Cbeyond Communications, Conversent Communications, Echelon Telecom, NuVox Communications, TDS Metrocom and XO

16/ Each of these federal pleadings is available on the FCC's website at http://www.fcc.gov/transaction/verizon-mci.html or http://www.fcc.gov/transaction/sbc-att.html. PAETEC would also be happy to provide electronic copies if Staff requests them.

17/ *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Comments of Global Crossing North America, Inc., at 6-20 (filed May 9, 2005) ("Global Crossing FCC Comments"); *see also generally* Global Crossing FCC Comments, Statement of Dr. Joseph Farrell.

18/ Global Crossing FCC Comments at 13.

19/ *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Opposition of Broadwing Communications, LLC, and SAVVIS Communications Corporation to the Merger Application filed by Verizon Communications Inc., and MCI, Inc., at 2-6, 15-16, 20-36 (filed May 9, 2005) ("Broadwing/SAVVIS FCC Comments"); *see also generally* Broadwing/SAVVIS FCC Comments, Declaration of Mark Pietro and Declaration of Gary Zimmerman.

Communications, which included a detailed analysis of some New York markets on a building-by-building basis.[20/]

Finally, the evidence and viewpoints of the large business customers who are most reliant on the use of special access to obtain their high volume communications services from incumbent LECs and competitive LECs alike should be considered. Their trade group, the Ad Hoc Telecommunications Users Committee, filed comments with the FCC that focused solely on special access.[21/] Ad Hoc stated, in part, that "[t]he greatest single threat to the emergence of robust competition in telecommunications markets is the continuing stranglehold on the special access market exercised by" incumbent LECs.[22/] Thus, according to Ad Hoc, the merger cannot be approved until competition emerges in Verizon's special access markets or the merger is subject to voluntary or involuntary conditions that protect consumers and competition.[23/]

III. THE COMBINED ENTITIES WOULD HAVE THE ABILITY, BOTH INDIVIDUALLY AND JOINTLY, TO UNILATERALLY RAISE PRICES AND LIMIT THE AVAILABILITY OF TRANSPORT AND SPECIAL ACCESS SERVICE OFFERINGS

If the proposed mergers are consummated, then the two primary alternative vendors of interoffice transport and high-capacity loops will be subsumed by incumbent LECs. Evidence submitted by various parties in these proceedings and in the FCC merger proceedings

20/ *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Petition to Deny of Cbeyond Communications, Conversent Communications, Eschelon Telecom, TDS Metrocom, NuVox Communications, and XO Communications, at 18-34 (filed May 9, 2005) ("Joint CLEC FCC Comments"); *see also generally* Joint CLEC FCC Comments, Declaration of Simon Wilkie.

21/ *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Comments of the Ad Hoc Telecommunications Users Committee (filed May 9, 2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Reply Comments of the Ad Hoc Telecommunications Users Committee (filed May 24, 2005) ("Ad Hoc FCC Reply Comments").

22/ Ad Hoc FCC Reply Comments at 1.

23/ Ad Hoc FCC Reply Comments at 23-25.

demonstrates that the combined entities would, both individually and jointly, have the ability to raise prices, limit the availability of transport and special access services, and raise rivals' costs. Commission Staff views raising rivals' costs as including "anti-competitive acts such as delaying provisioning and repair intervals, increasing prices, and erecting other barriers to entry which are costly to overcome."[24/]

For example, Global Crossing has provided substantial evidence that the merger will increase Verizon's ability to impose and to sustain supra-competitive special access prices and will also have significant anticompetitive consequences in the retail business end-user market, where high-capacity loops and other special access services are essential inputs.[25/] Similarly, Broadwing and SAVVIS have shown that the net effect of unfettered approval of these mergers will be poorer service quality and higher rates for special access circuits. The Broadwing/SAVVIS FCC Comments are particularly telling, because, as they note, special access was not a major issue for them until the announcements of these proposed mergers. Now, Broadwing and SAVVIS have reviewed their special access usage and recognized their vulnerability to the unfettered market power of the proposed merged entities. They show that special access is between forty percent (40%) and sixty percent (60%) of the cost of serving their enterprise customers, and that the cost will rise if Verizon's increased market power goes unchecked.[26/] Broadwing and SAVVIS further demonstrate that if the Verizon/MCI merger is approved, it will be necessary to: (1) enforce conditions ensuring that competitors will be able to obtain special access at the same rates and on the same terms and conditions (including

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24/ White Paper at n.80.

25/ Global Crossing FCC Comments at 16-20.

26/ Broadwing/SAVVIS FCC Comments at 28.

performance and other non-price conditions) at which the merged entity provides special access to itself; and (2) order divestitures that ensure the survival of a viable entity providing the special access alternatives that MCI provides today.[27]

The key business users agree with competitors' analyses of the anticompetitive potential of the merged entities, particularly Verizon/MCI. For example, Ad Hoc demonstrated how the lack of competition in special access markets can be exploited by Verizon and other incumbent LECs to raise competitors' costs and impede competitive entry into telecommunications markets. Ad Hoc also shows that the post-merger market power will allow incumbent LECs to charge even more unjust and unreasonable rates to enterprise customers, who already pay over $17.5 million dollars per day in excessive charges for special access.[28/]

The evidence presented by the various parties is buttressed by common sense analysis. Entrance facilities no longer are required to be made available as UNEs under the FCC's *TRRO*.[29/] This means that if a competitive LEC such as PAETEC wishes to connect to Verizon's network, it must either construct the necessary facilities itself at enormous time and expense, or procure such facilities on a commercial basis from Verizon or an alternative provider. In New York, the primary competitive alternatives to Verizon for entrance facilities and other alternative forms of interoffice transport are MCI (through its MFS operating subsidiary) and AT&T (through its TCG operating subsidiary), which "provide discounted pricing arrangements for those facilities which are competitive with or significantly better than the terms or pricing

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27/ Broadwing/SAVVIS FCC Comments at 36-37.

28/ Ad Hoc FCC Reply Comments at 2.

29/ *TRRO* ¶¶ 138-41.

arrangements that Verizon offers to many smaller carriers."[30/] Years of business experience (not to mention economic and antitrust learning) teaches that absent such competition, prices will rise and service will deteriorate. In this case, that means that Verizon will increase prices and that provisioning delays will worsen. Unfortunately, no ubiquitous competitive alternatives will exist in New York to counteract that anticompetitive trend.

All of this evidence leads to one inevitable conclusion. When a proposed merger will result in an entity possessing the power to unilaterally raise prices, restrict output and raise rivals' costs, and there is no competitive presence sufficient to exert downward pricing pressure on the market, divestiture of critical assets is appropriate.[31/] Absent divestiture of the New York Special Assets, this is precisely the situation that exist will in New York post-merger. The ability of PAETEC and every other competitor to obtain reasonable and cost effective access to interoffice transport and high-capacity loops would be severely undermined.

IV. A STRUCTURAL REMEDY SUCH AS DIVESTITURE IS PREFERRED TO CURB FUTURE ABUSES OF THE COMBINED ENTITIES' MARKET POWER

In October 2004, the U.S. Department of Justice, Antitrust Division, issued a report entitled "Antitrust Division Policy Guide to Merger Remedies" (the "Federal Merger Remedy Guidelines"). In that report, the Antitrust Division clearly articulated its preference for structural remedies, *i.e.* divestitures, to cure competitive harms arising out of a merger.[32/] As Commission

[30/] White Paper at 41.

[31/] United States Antitrust Division Policy Guide to Merger Remedies, at 12 (October 2004) ("Federal Merger Remedy Guidelines").

[32/] Federal Merger Remedy Guidelines at 12.

Staff indicates in the White Paper, the Commission should, in undertaking its merger analysis, comport with these Federal Merger Remedy Guidelines.[33/] The Guidelines state:

> The speed, certainty, cost, and efficacy of a remedy are important measures of its potential effectiveness. Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market. A carefully crafted divestiture decree is 'simple, relatively easy to administer, and sure' to preserve competition. A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.[34/]

The applicability of the Federal Merger Remedy Guidelines is buttressed by a July 29, 2005 letter, attached hereto, in which Senators DeWine and Kohl urge the Antitrust Division and the FCC to order the divestiture of facilities to cure competitive harms arising out of these two mergers.[35/] The Senators noted that "divestiture is a traditional, important and often effective antitrust remedy, and so this issue must be carefully explored and resolved in order to determine whether divestiture might alleviate potential anticompetitive impacts in certain local markets."[36/]

The benefits of divestiture of the New York Special Assets are manifest in this situation. First, the resulting new network service provider would be independent and thus would have a more traditional supplier/customer relationship with PAETEC and other competitive LECs. From the standpoint of encouraging the development of competition in these markets in New York, this is vastly preferable to expanding Verizon's dual roles as both competitor and supplier

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33/ White Paper at 17-18.

34/ Federal Merger Remedy Guidelines at 7-8.

35/ Letter from Senator Mike DeWine, Chairman, Subcommittee on Antitrust, Competition Policy, and Consumer Rights and Herb Kohl, Ranking Member, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to the Honorable Thomas Barnett, Acting Assistant Attorney General, Antitrust Division, United States Department of Justice and the Honorable Kevin J. Martin, Chairman, Federal Communications Commission (July 29, 2005) (Attachment) ("DeWine/Kohl Letter").

36/ DeWine/Kohl Letter at 3.

to competitive LECs. Second, it will create a more level playing field in New York.[37/] To the extent that Verizon wishes to use the New York Special Assets, it will have to do so on a commercial basis – the same as PAETEC or any other competitive service provider. Third, divestiture would inhibit collusion, since it would be far easier to gauge whether the quality of service (including issues such as provisioning intervals, restoration of outages, and maintenance) under which the New York Special Assets are made available to PAETEC and other competitive LECs is at parity with the quality of service provided to Verizon.

Finally, divestiture will result in more rapid deregulation in New York generally. A combined Verizon and MCI, however, will create a potentially hegemonic power in the New York telecommunications market. Assuming, *arguendo*, that the Commission were not to require divestiture, it would necessarily have to impose heightened rate regulation and the strictest of conduct remedies on the combined entity for many years to come in order to curb future abuses of the combined entities' market power.

In contrast to the myriad problems with conduct remedies discussed below, divestiture of the New York Special Assets would be a simple, easy to administer, effective, and permanent solution. It would preserve competition in the New York transport market, while avoiding imposition of potentially stifling conditions on the combined Verizon/MCI.

The goal of any divestiture is to preserve the pre-merger level of competition.[38/] Assets included in any divestiture must be substantial enough to ensure that competitors can compete

[37/] *See generally* Case 05-C-0616, *Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services*, Order Initiating Proceeding and Inviting Comments (June 29, 2005) (looking at ways to create a level playing field).

[38/] Federal Merger Remedy Guidelines at Section III.B.

effectively and in a timely fashion over the long term.[39/] The Federal Merger Remedy Guidelines make clear that divestiture of an entire business entity that has demonstrated its ability to compete in the relevant market (in this case New York) is preferred.[40/]

PAETEC does not have sufficient knowledge about the legal structure, business, or network operations of Verizon or MCI to specify which assets or operating subsidiaries must be divested in order to preserve competition in the interoffice transport and special access markets. One possibility, however, may be the divestiture of MFS, which has demonstrated its ability to compete in the New York market. MFS was one of the earliest competitive access providers from its beginnings in the early 1990s. As an operating subsidiary of MCI, it continues to be the primary competitive alternative for interoffice transport in New York. To PAETEC and others doing business with MFS, it certainly appears to possess not only all the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient provision of interoffice transport services.

In sum, a structural remedy such as divestiture would provide speed, cost, and efficacy, would be clean and certain, and would avoid costly ongoing government entanglement. Only through the divestiture of the New York Special Assets (whether that be the MFS subsidiary or some other combination of assets) can the preservation of the interoffice transport market in New York be ensured.

[39/] Federal Merger Remedy Guidelines at Section III.B.

[40/] Federal Merger Remedy Guidelines at Section III.C.

V. CONDUCT REMEDIES ARE INADEQUATE TO ACHIEVE THE GOAL OF ENSURING THE PRE-MERGER LEVEL OF COMPETITION

In the White Paper, Staff sought comment on whether threats to the state of competition in the interoffice transport market can be adequately addressed through a "conduct remedy" such as a thirty-six (36) month price freeze.[41/] PAETEC submits that the answer to this question is no.

Conduct remedies are difficult to craft, cumbersome and costly to administer, and easy to circumvent. Conduct remedies suffer from the four major flaws outlined in the Federal Merger Remedy Guidelines: (1) they involve significant direct costs associated with monitoring the merged firm's activities, and ensuring adherence to decrees; (2) they involve significant indirect costs associated with the merged firm's noncompliance with the decree's spirit, while not violating its letter; (3) they may constrain potentially pro-competitive behavior, especially in terms of pricing flexibility; and (4) even where effective, they may prevent the merged firm from responding effectively to changed market conditions in legitimate ways.[42/] Each flaw is addressed in turn below.

First, recent experience in New York demonstrates the enormous direct costs associated with ongoing oversight of Verizon. The Commission has applied both service quality standards and performance benchmarks to Verizon, and has devoted enormous resources - through enforcement proceedings, the handling of complaints, and adjudications - to enforcing these standards and benchmarks. Second, both the Commission and competitive LECs also have incurred enormous indirect costs to monitor Verizon's compliance with the spirit of the

41/ White Paper at 37.

42/ Federal Merger Remedy Guidelines at 8-9.

Commission's performance standards. Competitive LECs have often had to litigate, and the Commission has had to adjudicate, numerous disputes involving Verizon's conduct.

Third, conduct remedies could inhibit potentially pro-competitive behavior on the part of Verizon. The preference for competition over regulation in the telecommunications market is no longer the subject of debate at either the state or federal level. Conduct remedies, however, are perhaps the strictest form of regulation. They discourage investment and innovation on the part of the regulated entity. Finally, conduct remedies may inhibit legitimate market responses on the part of Verizon, especially in terms of pricing flexibility to respond to market conditions.

One particular conduct remedy proffered in the White Paper is the possibility of requiring MCI to offer smaller carriers, for a period of thirty-six (36) months, the same rates, terms, and conditions for MCI special access loop service offerings that it is providing today.[43/] If the Commission were to order the divestiture of the New York Special Assets as discussed herein, this issue would become moot. If, however, the Commission were to order something less than complete divestiture of the New York Special Assets, *e.g.* divestiture only of interoffice transport facilities, then this issue would become relevant.

The Commission should not be under any illusions as to the effectiveness of a freeze on the rates, terms, and conditions of MCI's special access loop service offerings in restoring competition to pre-merger levels. As Staff noted and as discussed above, Verizon dominates the special access loop market. Indeed, substantially all of the special access loops utilized by PAETEC are purchased from Verizon, and most pursuant to interstate tariffs. In other words, a freeze on the rates, terms, and conditions of MCI's intrastate special access loop service

[43/] White Paper at 45.

offerings would do little or nothing to mitigate the anticompetitive effects of the proposed merger.

CONCLUSION

For the foregoing reasons, PAETEC Communications, Inc. submits that as a condition of the proposed mergers the Commission should impose the structural divestiture remedy discussed herein, and all other relief the Commission deems just and proper.

Respectfully submitted,

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Dated: August 5, 2005

Attachment

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

July 29, 2005

The Honorable Thomas Barnett
Acting Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Acting Assistant Attorney General Barnett and Chairman Martin:

We write to you concerning the consolidation now underway in the telecommunications industry, specifically SBC's proposed acquisition of AT&T and Verizon's proposed acquisition of MCI. We believe that these two mergers raise very important competition and communications policy issues and should be examined carefully by both of your agencies. We have reviewed these transactions extensively at the Judiciary Committee and at the Antitrust Subcommittee, including holding two hearings regarding the competitive consequences of these deals over the last several months.

These proposed mergers would each combine one of the nation's two largest regional bell operating companies ("RBOCs") with one of the largest internet backbone and long distance companies. Moreover, the acquiring RBOCs, AT&T and MCI compete for business customers and, until recently, competed for residential consumers as well. These mergers are the most fundamental reshaping of the telecommunications marketplace since the break-up of the old Bell company phone monopoly more than twenty years ago. The acquiring RBOCs will become the dominant providers of many telecommunications services in their regions after these mergers are completed.

We recognize that the telecommunications marketplace has changed drastically since the AT&T break-up in 1984. The rise of new technologies and new modes of communications, ranging from wireless phones to the internet, have given consumers an expanded array of choices and products, and led to lower prices and increasingly efficient means of communications. Continued technological development is likely to benefit consumers and further diversify the marketplace. And competition among the various parties, at least in the residential sector, does not appear to be as strong as it once was; accordingly, that element of these transactions may not require the level of scrutiny that would have made such deals "unthinkable" in the past. In fact, it is our best judgment that the mergers, on balance, do not "substantially lessen competition" as understood under the antitrust laws.

Nonetheless, like many mergers these deals may pose anticompetitive problems if approved without modification, and given the size and competitive heft of the various companies involved, the deals do appear to raise a number of concerns. Many of those concerns have been answered by the parties with one response - - "intermodal competition," i.e. competition from different types of telecommunications services. Accordingly, it seems appropriate to consider if intermodal competition really is a solution to the concerns raised and, if it is, to consider steps that might be necessary to ensure its existence.

We believe, therefore, that a primary concern should be to ensure that the market conditions exist which would allow these intermodal options an opportunity to compete. The merging parties should not be able to utilize the market power likely to be created by these mergers to block or retard the development of these new technologies or to create anti-competitive bottlenecks.

Our examination of these transactions leads us to recommend, therefore, the consideration of certain merger conditions by your agencies in order to avoid the risk of injury to competition and consumers and to prevent anti-competitive barriers in the telecom market. These are:

1. The acquiring RBOCs commit to sell unbundled DSL high speed internet service to consumers without requiring that consumers also purchase traditional phone service. Requiring consumers to buy phone service when they purchase DSL service substantially diminishes the incentive of consumers to purchase Voice over Internet Protocol (VOIP) phone service from independent VOIP providers and is therefore a significant barrier to the development of the competitive deployment of VOIP as an alternative to the RBOCs. While we recognize that bundling services offers certain consumer and competitive benefits, in this instance mandatory bundling seems likely to diminish competition more than can be justified by any potential consumer benefit. Further, it should be noted that such a condition would not be onerous - - Qwest is already offering unbundled DSL service and both Verizon and SBC have taken steps towards offering unbundled service as well, albeit on a limited and introductory basis.

2. The acquiring RBOCs commit to a principle of non-discrimination on their networks, a principle that some refer to as "net neutrality." This principle would manifest itself in, among other things, a concrete commitment to refrain from blocking or in any manner degrading the transmission of any competitor data packets, either in the transmission of this data over the internet backbone assets to be acquired by the RBOCs, or on the RBOCs' "last mile" connections to their customers. The result of this would be to assure that, among other things, competitors' VOIP data is treated no differently than any other data packets. Again, such a condition would not be onerous - - both SBC and Verizon have already stated publicly that they do not practice such discrimination and that they will not do so in the future.

3. The acquiring RBOCs commit to provide full access to the RBOCs' 911 and E911 networks on nondiscriminatory terms. There have been several instances where consumers using VOIP phones have been unable to adequately connect with 911 emergency services. As a matter of competition policy it is important that VOIP providers have the ability to ensure such connections are made quickly and routinely; as a matter of telecommunications and public policy it is critical. While this condition may require further technological investment and improvement, SBC and Verizon have already begun to take steps to assure this connectivity is provided and completion of those efforts does not appear likely to impose undue burdens on the parties.

4. The acquiring RBOCs divest duplicative local loop facilities acquired from AT&T and MCI in these transactions, when appropriate. There is a good deal of uncertainty about the extent to which such overlapping facilities exist and the extent to which divestiture would allow enhanced competition. For example, many within the industry claim that significant overlapping local facilities exist and that they could easily and quickly be used by numerous competitive carriers to replace some of the local competition lost as a result of the merger. The merging parties, however, dispute the extent of local facilities' overlap and argue that intertwined systems and the multiple services provided to consumers over these systems would make it difficult and disruptive to divest these local facilities. As you both are aware, divestiture is a traditional, important and often effective antitrust remedy, and so this issue must be carefully explored and resolved in order to determine whether divestiture might alleviate potential anticompetitive impacts in certain local markets.

We also urge that your agencies consider any other conditions upon approval of these mergers that you determine are necessary to preserve competition or protect consumers.

It goes without saying, of course, that as a matter of traditional Clayton Act Section 7 antitrust enforcement any such conditions should be directly tied to the impact of the merger, just as it goes without saying that there is a good deal more leeway for agency action under the public interest standard which guides FCC review. However, the potential imposition of conditions on these mergers does raise a much broader issue of whether it might be more appropriate to regulate uniformly, across the entire industry, rather than focus on these specific companies merely because they happen to be merging at this time. Clearly, broader rules and uniform application are far preferable. It is unacceptable that several pending FCC rulemakings regarding crucial telecommunications regulatory issues (for example, the proceeding on intercarrier compensation, CC Docket No. 01-92; the proceeding to determine the proper regulatory framework for wireline broadband Internet access services , CC Docket Nos. 02-33 and 98-10; the proceeding on pricing of unbundled network elements, WC Docket No. 03-173; and the proceeding to establish rules and pricing regarding special access services, WC Docket 5-25) remain unresolved, and the entire industry is suffering due to the ongoing uncertainty caused by these delays. However, that does not change the fact that four of the largest telecommunications companies in the world are merging; it would be irresponsible competition policy to ignore that reality, and to ignore the effect these deals will have throughout the industry, merely because broader regulatory decisions are unresolved. Sometimes merging parties, when their actions fundamentally reshape a market, must accept restraints that are not immediately shared by the rest of the industry. Accordingly, while rules of uniform application might be preferable, we believe that it is reasonable for merger conditions to be considered in this instance.

Finally, we have also examined the pending merger between Sprint and Nextel in the wireless sector. It appears that this merger does not raise the same concerns as the mergers in the wireline sector, and, indeed, there are strong arguments that it may enhance competition by creating a stronger intermodal competitor to the RBOCs. We urge that your agencies' examination of this transaction be conducted concurrently with the wireline mergers, and that your final decision on the Sprint/Nextel transaction not be in any way delayed by your consideration of the wireline mergers.

We believe that robust and vigorous competition in the telecommunications market is essential to consumers and to our national economy. The two decades following the break-up of the Bell phone monopoly produced an explosion of new technologies and new choices for consumers, choices which substantially reduced the costs of telecommunications services and improved the efficiency and quality of these services throughout the economy. We believe that consideration of the enumerated conditions discussed above will ensure that the benefits of this competitive marketplace not be lost amidst this telecom consolidation.

Thank you for your attention to this matter.

Very respectfully yours,

Mike DeWine

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Herb Kohl

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