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August 31, 2005

BY COURIER

Jaclyn A. Brilling, Secretary
New York State Department of Public
Service
3 Empire State Plaza
Albany, New York 12223-1350

Re: Case No. 05-C-0237

Dear Secretary Brilling:

Attached hereto for filing in the above-referenced proceeding are the Reply Comments of Gillette Global Network, Inc. D/B/A Eureka Networks, Lightyear Network Solutions, LLC, Pac-West Telecomm, Inc., Mpower Communications Corp., and US LEC Corp.

An original and five (5) additional copies of this filing are attached. Also attached is an extra copy of this filing. Please date-stamp it and provide it to the courier.

Should you have any questions concerning this filing, please do not hesitate to contact me.

Sincerely,

Philip J. Macres

Philip J. Macres

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Enclosure

cc: Active Party List, Case No. 05-C-0237 (via e-mail)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Joint Petition of Verizon Communications 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

REPLY COMMENTS OF GILLETTE GLOBAL NETWORK, INC. D/B/A EUREKA NETWORKS LIGHTYEAR NETWORK SOLUTIONS, LLC MPOWER COMMUNICATIONS CORP. PAC-WEST TELECOMM, INC. USLEC CORP.

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Dated: August 31, 2005

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Gillette Global Network, Inc. D/B/A Eureka Networks, Lightyear Network Solutions, LLC, Pac-West Telecomm, Inc., Mpower Communications Corp., and US LEC Corp., (collectively "Commenters") submit these reply comments in this proceeding concerning the Department of Public Service Staff White Paper ("White Paper").

I. INTRODUCTION AND SUMMARY

The proposed merger of Verizon with one of its largest competitors constitutes a competitive injury *per se* that should preclude any approval of the merger. While Verizon would increase its monopoly share in New York State markets upon consummation of the merger, the public interest would be better served if it were required to compete for MCI customers. Verizon and MCI contend that each is somehow subject today to vigorous competition from a multitude of fledgling entrants – entrants that have only a fraction of each Applicant's current size, and have none of the advantages of Verizon's incumbent status. In fact, however, as Applicants are well aware, the chief obstacles to local competition include not only lack of access to capital, but also the determination of incumbent LECs, such as Verizon, to do everything in their power to defeat competitive entry and to make essential network elements unavailable and otherwise to thwart implementation of the Act. The merger will exacerbate these fundamental obstacles to meaningful competitive entry.

Staff's analyses of the proposed merger and its conclusions that the merger would decrease competition in all markets confirms this. The Staff's White Paper thoroughly evaluated the impact of the merger on the retail markets and the wholesale loop and transport markets and correctly concluded that upon merging with MCI, Verizon will have increased concentration in all markets and that its significant market power will foster harmful anticompetitive behavior.

Verizon contends that the Staff's analysis and conclusions are flawed. However, contrary to Verizon's criticisms and as further detailed below, the Staff's White Paper properly performed HHI calculations, gave limited weight to intermodal competition (such as cable, wireless, VOIP, and BPL), and otherwise found that there is insufficient competition in the marketplace to offset the harms of the merger.

In addition to these findings, the proposed merger raises serious public interest questions because of undue concentration in the IP backbone market, in New York State and elsewhere. Commenters accordingly urge the Commission to evaluate the detrimental impact of the merger of the on the Internet backbone market at the state level and condition the merger accordingly notwithstanding national impacts. An analysis of the the horizontal and vertical integration that will occur if the merger is approved reveals that it will significantly hamper competition and foster anti-competitive pricing, access and quality of services.

For the above reasons, the Commission should deny the Application. If it chooses not to do so, the Commission should impose substantially stronger safeguards than those considered in the White Paper. Such conditions should address and offset the harmful impact of the Verizon/MCI merger should it be approved and should promote a competitive environment, which, in turn, will bring service options and better prices to retail markets.

Specifically, to help assure a competitive environment in New York State with respect to Verizon's retail and wholesale loop and transport offerings, Commenters urge the Commission to impose Staff's proposed conditions, as discussed herein, and that additional conditions be as well. In addition, Commenters propose that the Commission require Verizon (1) to allow any IP network to peer with the merged Verizon and MCI if that network interconnects at a specified number of peering points, and (2) to provision interconnection to the IP backbone and transit service to non-peering ISPs and CLECs at LRIC rates. The Commission should also impose net neutrality requirements on the merged company and prohibit it from imposing any Session Initiation Protocol ("SIP") use restrictions or limitations.

II. STAFF CORRECTLY CONCLUDED THAT THE PROPOSED MERGER WOULD DECREASE COMPETITION IN ALL MARKETS

The White Paper carefully evaluated the impact of the merger on the retail mass and enterprise markets and on the wholesale transport and special access markets and concluded that it would significantly increase concentration in all of them and produce anticompetitive harm. With respect to the mass market, the White Paper concluded that the mergers would result in a significant increase in concentration that should be addressed.[1] Commenters agree with the Staff Report's tentative conclusion that in "the large business (enterprise) and medium size business markets, ... the Verizon/MCI merger will produce significant consolidation and is, therefore ...troubling"[2] and that "the proposed merger results in an increase in concentration in the enterprise market which exceeds the threshold levels in the DOJ/FTC Guidelines, and, therefore, requires countervailing remedies."[3] The White Paper found that the proposed merger would substantially reduce the number of wholesale competitive loop and transport providers, even for many of the routes considered to be most competitive under the FCC's new UNE rules.[4] Indeed, it would have been impossible for the Staff to reach any other conclusions in light of the overwhelming fact that Verizon is proposing to purchase one of its biggest retail and wholesale competitors. The White Paper used appropriate methodologies and measures, specifically the

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1 White Paper at 26.

2 White Paper at 6.

3 White Paper at 32.

4 White Paper at 37, 44.

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HHI, to determine that the proposed Verizon/MCI merger would produce undue concentration in virtually every market segment in New York State.

Verizon's criticisms of the White Paper fall into three main categories: the Staff's Herfindahl-Hirschman Index ("HHI") calculations were erroneous, the White Paper ignored intermodal competition, and there is significant competition that eliminates any need for conditions. None of these criticisms has any merit.

HHI Calculations. Verizon's criticisms of the White Paper's HHI calculations focus at best on quibbles that do not change the overwhelming reality of market concentration that would be caused by the merger. Verizon's criticisms are particularly unpersuasive, for example, when it criticizes use of Verizon's own data drawn from the PAP.[5] Verizon's claim that it was error for the staff to rely on the most current data available, rather than Verizon's self-serving speculation about future market conditions, merely confirms that Staff's analysis of the current impact of the merger is correct.[6] Similarly, Verizon has avoided providing its own HHI analysis, verifying that Staff's tentative conclusions are correct in essential respects. In short, even if Verizon's calculations are correct, the resulting HHI calculations show that an already concentrated telecommunications market in New York State will become much more so.

Intermodal Competition. Verizon contends that Staff failed to take into account intermodal competition in the mass market, which the Staff apparently defined as including residential and small business customers.[7] Verizon is clearly wrong that there is any significant intermodal competition for small business customers "because there is no reliable evidence that

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[5] Verizon Comments at 23.

[6] Verizon Comments at 21.

[7] White Paper at 19, n. 44. Commenters agree with Conversent that the Commission should limit the mass market to residential and single line business customers. Conversent Comments at 5.

any "of these technologies and service categories has yet posed anything like a significant competitive antidote to the incumbents' market power."[8] Notably, the FCC found in its recent *TRRO* that "the record does not indicate that other intermodal options, such as fixed wireless and satellite, offer significant competition in the enterprise loop market."[9]

Predictions of expansive broadband competition from the electric power industry and wireless broadband technology have been plentiful but have yet to come true. Although some have predicted competition from electric utility communications services for years, no viable competition has taken root.[10] Verizon's claims regarding the impact of cable broadband competition in the business market also lack evidentiary support. As the FCC has recently observed, "cable modem service is primarily residential service."[11] In many markets, cable networks only pass – let alone serve – just a quarter of business customers.[12] Fewer than 1% of

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[8] *See Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services)* Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12618 ¶ 164 (1997) ("*LMDS Order*").

[9] *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 19 FCC Rcd 16783, FCC 04-290, ¶ 193 & n.508 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

[10] *1995 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, ¶ 120 (1995) (Commission observed that electric utilities that have incurred substantial costs to deploy networks that reach nearly every household in the country could compete with cable companies).

[11] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at p. 14 (rel. Sep. 9, 2004) ("*Fourth Advanced Services Report*").

[12] Ex parte letter of Jonathan Banks, BellSouth, to Marlene H. Dortch, FCC, WC Docket 04-313, CC Docket 01-338, at 5 (filed Nov. 8, 2004).

cable modem subscribers are medium or large businesses or government entities.[13] The *TRRO* confirms that cable modem service is unsuited, and therefore not a substitute, for ILEC services for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and lacks sufficient reliability and security.[14] Indeed, the FCC expressly found that the RBOCs provided "little evidence that cable companies are a significant presence in the enterprise loop market."[15] Rather, to the extent that cable companies provide service to business customers, it is in the mass market to "small and medium business … that are near the residential network."[16] Simply put, there is no evidence that cable operators provide a serious alternative to serve the large business customer niche that is currently served by MCI and Verizon.

Moreover, to the extent that cable does provide a competitive alternative, it does not do so to the extent necessary to permit the proposed merger. The FCC has previously found that competition sufficient to diminish the need for regulation will not exist where the market is primarily allocated between two dominant firms.[17] Courts have recognized that a duopoly in the market is the equivalent of a monopoly because, "firms in a concentrated market … in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[18] A "durable duopoly affords both the opportunity

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[13] *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (December 2003), Table 1 and Table 3.

[14] TRRO, ¶ 193.

[15] *Id.*

[16] *Id.*

[17] *See Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee,* CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, 17 FCC Rcd 20559, 20684 ¶¶ 103-105 (2002) ("*EchoStar Merger Order*").

[18] *Brooke Group v. Brown & Williamson*, 509 US 209, 227 (1993).

and incentive for both firms to coordinate to increase prices."[19] Thus, at a minimum, even to the limited extent that Verizon shares its service monopoly with cable, it retains market power and the incentive to abuse that power. Moreover, there are numerous areas throughout Verizon's service territory where cable does not compete with Verizon at all. Many mass-market consumers lack access to cable modem service.[20]

VoIP is also not yet a significant competitor. In the first place, similar to issues faced by providers seeking to compete with Verizon in the business market segment, VoIP requires customer access to be provided by local network operators – and in the vast majority of its exchanges that will be Verizon, or a CLEC using last mile facilities from Verizon. To use VoIP, a customer needs to obtain broadband Internet access, which may not be available for all businesses, except from wireline carriers, usually Verizon. VoIP has only been deployed in the mass-market for a couple of years at this point, and there are questions about its scalability (*i.e.*, can it serve tens of millions of users) and service quality and reliability. Even leaving aside the problems that VoIP providers have had with 911 and call reliability, long-run future gradual substitution of VoIP for wireline local voice services—assuming that it occurs--does *not* put VoIP in a relevant antitrust market at this time with all wireline services. The fact that VoIP applications may some day replace traditional wireline voice services is, thus, irrelevant, as these potential trends have nothing to do with market definition analysis. Rather, the test is whether VoIP providers other than Verizon offer an economic substitute for Verizon's traditional wireline telecom services,[21] and Verizon has not provided any evidence of price-related substitution of

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[19] *FTC v. Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001).

[20] *See* AT&T Comments, WC Docket 04-405, at 41.

[21] *See, e.g., Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* 17 FCC Rcd 23246, ¶ 41 (2002).

VoIP for any service, so it is impossible to reach the conclusion that VoIP is in the same market with wireline. But even if customers do migrate to VoIP, it is clear that Verizon will be a beneficiary of that trend, as Verizon has its own VoIP service, VoiceWing. Thus, even if VoIP is in the same market as wireline, it is unlikely that Verizon's market share would be significantly smaller in a wireline/VoIP market than it is in a solely wireline market. And again, most of the VoIP players in the space will be beholden to Verizon for last mile access to the end user customer using the VoIP application over Verizon's facilities.

Moreover, Verizon continues to aggressively use tactics to stymie existing VoIP competition such as asserting that this traffic is subject to access charges and filing lawsuits against carriers that terminate VoIP traffic, in addition to not cooperating in providing 911 access to VoIP carriers.

Nor is there any evidence that wireless service providers could provide the kind of competitive broadband alternative that Verizon claims. The failure of previous efforts to provide commercially viable wireless broadband access are well documented, and the current efforts at delivering wireless broadband remain in the developmental stages. As the Wall Street Journal recently observed:

> Wireless-broadband services have a rocky history. Companies such as Winstar and Teligent tried to offer similar services during the telecom boom of the late 1990s, with limited success. Sprint's efforts with so-called fixed-wireless technology led to a $1.2 billion write-down.
>
> For the technology to get even more affordable, experts say the much-hyped WiMAX technology needs to be certified and standardized, which could still be a year away, and another year

> after that before it is widely available in laptops and other devices.[22]

In the *TRO*, the FCC discounted mass-market broadband competition from the wireless sector, observing that "fixed wireless and satellite services remain nascent technologies, with limited availability."[23] And while millions of American consumers have started using cell phones in recent years, there is little evidence that cell-phone technology is an economic substitute for wireline technologies. In other words, very few consumers have "cut the cord" and become "wireless only" users.[24]

But even if wireless broadband alternatives were somehow relevant to the analysis (which they are not), Verizon owns a majority share of the country's second largest wireless company, Verizon Wireless.[25] According to the methodology used by the federal antitrust agencies, partially owned subsidiaries are assigned entirely to their parents when calculating market shares and the HHI.[26] And although the parties have not provided the data, we can presume that Verizon Wireless's market share in Verizon's region is larger than elsewhere in the

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[22] Jesse Drucker and Almar Latour, Internet and Phone Companies Plot Wireless-Broadband Push, THE WALL STREET JOURNAL, January 20, 2005, p. A10, viewed January 24, 2005 at http://online.wsj.com/article_print/0,,SB110617646006230682,00.html.

[23] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 231 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order*" or "*TRO*") (subsequent history omitted).

[24] Julian V. Luke and Marcie L. Cynamon, *The Prevalence of Wireless Substitution* (presented at 59th Annual Conference of the American Assn. for Public Opinion Research May 15, 2004).

[25] *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Description of the Transaction, at iii (filed March 11, 2005). Notably, SBC Communications owns 60% of the largest wireless company, Cingular.

[26] "Instructions," Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions, p. v.

country. Thus, even if wireless service is included in the relevant market, it is not clear that the concentration levels for a "wireline plus wireless market" in the relevant area would be significantly lower than for wireline alone.

Competition. Verizon contends that the merger will not harm competition because, in effect, the telecommunications market in New York State is already robustly competitive. However, most competitors in the state are dependent on Verizon facilities. Verizon itself notes that many competitors use special access channel terminations purchased from Verizon.[27] Verizon contends that most of its special access revenues derive from wholesaling to competitors.[28] Most other competitors are dependent on access to Verizon facilities as UNEs. And, the FCC's recent *TRRO* definitively refutes Verizon's contentions that the telecommunications market in New York State is competitive because the FCC found that LECs are impaired without access to ILEC facilities, especially loops, as UNEs from the a large majority of wire centers. Indeed, the Commission explicitly found in the *Triennial Review Remand Order* that ILECs, including Verizon, retain market power in all relevant business markets, concluding that, "the barriers to entry impeding competitive deployment of loops are substantial."[29] The FCC found that CLECs "face substantial operational barriers to constructing their own facilities;"[30] that Competitors still face "steep economic barriers" to the deployment of last mile facilities;[31] and that these barriers "typically make duplication of such facilities

[27] Verizon Comments at 53.

[28] *Id.*

[29] *TRRO*, ¶ 153.

[30] *Id.* ¶ 151.

[31] *See TRO*, ¶ 199.

uneconomic."[32] It is natural then that competitors have only built their own last mile facilities to a small percentage of business customers.[33] Facilities based CLECs, such as Time Warner Telecom, still rely on ILEC-provided loop facilities at 75% of their customer locations.[34] Even MCI has acknowledged that it relies on ILEC loops, and CLEC loops where they are available (rarely), to serve customers.[35] As former FCC Chairman Powell explained, in rejecting ILEC claims that competitors did not need access to unbundled last mile broadband facilities, "the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances."[36]

Applicants' reliance on the presence of systems integrators – who purchase service components from various providers – and the buying savvy of their business customers is unpersuasive.[37] The acquisition of MCI threatens to undermine the very basis for whatever success systems integrators have enjoyed in recent years. Systems integrators rely on the presence of many providers competing with one another at all levels in the market. This acquisition, together with SBC's acquisition of AT&T, will extinguish much of the competition on which systems integrators depend. Likewise, the negotiating savvy of business customers will become irrelevant if there are few competitive alternatives from which to choose.

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[32] *See TRRO,* Separate Statement of Commissioner Kathleen Abernathy.

[33] *See* Time Warner Telecom *et al.* Comments, WC Docket 04-405, at 9 (*citing* RBOC 2004 UNE Report) (filed Dec. 20, 2004).

[34] *See* WC Docket 04-405, Time Warner Telecom *et al.* Comments at 10 (filed Dec. 20, 2004).

[35] WorldCom, Inc. Comments, RM No. 10593, at 9 (filed Dec. 2, 2002); *see also*, WorldCom, Inc. Reply Comments, RM No. 10593, at 13 (filed Jan. 23, 2003).

[36] *See TRRO*, Separate Statement of Chairman Powell.

[37] Verizon Comments at 30.

Accordingly, there is no basis to conclude that intermodal competition lessens or ameliorates the undue concentration in the business markets that the proposed mergers would create.

Therefore, there is no basis for this Commission to conclude that competition, especially with respect to the small and medium-sized business market is sufficient to reduce or eliminate the increased potential for anticompetitive harms that would be caused by the merger.

Accordingly, Verizon in initial comments has failed to cast significant doubt on the Staff's conclusions that the proposed merger would create undue concentration in all markets, thus requiring conditions.

III. THE COMMISSION SHOULD ADDRESS IP BACKBONE ISSUES

The White Paper states that "[s]taff recognizes the potential impact of the merger on the Internet backbone market, but believes that a national perspective/analysis on this issue is required and that the implications of the merger on these markets should be reviewed by the Department of Justice and/or the Federal Communications Commission."[38] Commenters urge the Commission to evaluate the important impacts of the proposed merger at the state level and condition the merger accordingly notwithstanding national impacts.

The proposed merger raises serious public interest questions because of undue concentration in the IP backbone market, in New York State and elsewhere. From a horizontal impact perspective, the merger of Verizon/MCI, combined with the merger of SBC/AT&T, creates the potential for excessive concentration in the provision of Internet backbone services that will have a detrimental impact on horizontal competition for Internet backbone services, including in New York State. An HHI over 1800 is a sign of a "highly-concentrated" market according to the joint merger guidelines of the Federal Trade Commission and Department of

[38] White Paper at 18.

Justice.[39] In a highly concentrated market, an increase in the HHI of more than 50 points raises significant competitive concerns.[40] Evidence before the FCC shows an HHI increase of 105 points for the SBC-AT&T merger on its own, and an HHI increase of as much as 677 if the MCI-Verizon merger is also included, depending on which of the unidentified companies is Verizon.[41] Either way, in a highly concentrated market, significant competitive concerns are raised by the Verizon/MCI merger.

In addition, from a vertical integration perspective, the merger of Verizon, one of the largest Internet backbone purchasers and MCI, one of the largest Internet backbone providers, creates very serious public interest issues. The potential power of the merged company is critical, given that that all Internet backbone providers will have to compete with the merged Verizon-MCI

If the Verizon/MCI merger is approved, sellers of Internet backbone services in New York State will lose Verizon, one of the biggest purchasers in the market, as a customer. As with independent IXCs, this loss of purchasing volume for companies that sell to Verizon could force some of them out of the market. It will also have a potential damaging effect on buyers of Internet backbone services, as one of their largest competitors, Verizon, will now be one of the primary sellers they have to turn to for these services.

Verizon/MCI will also have the ability to adversely affect competition in New York State by discrimination in pricing, access and quality of services. "Interconnection" of IP broadband networks is currently implemented outside the normal telephone company regulatory framework

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[39] 1992 Horizontal Merger Guidelines §1.51.

[40] *Id.*

[41] *See* Declaration of Marius Schwartz on behalf of SBC and AT&T, WC Docket 05-65 (filed Feb. 18, 2005).

pursuant to "peer-to-peer" relationships. The FCC has to date declined to exercise regulatory oversight over peering. Whatever the validity of that policy in a market in which there were several providers of backbone services , the impending concentration of this market in the hands of local access providers, who can erect new barriers to entry by denying access to their local facilities, calls for an urgent re-examination of that policy. Currently, carriers like MCI and AT&T peer on a cost-free basis because they have similar size networks. On the other hand, smaller carriers must pay for peering with the larger networks. As a result, CLECs and ILECs are on an equal footing in terms of getting access to the Internet backbone because neither have large IP networks. With the merging of MCI with Verizon and AT&T with SBC, however, the combined companies will be large enough that they can peer with each other at no charge, but demand peering fees from CLECs.

In fact, as SBC previously argued in connection with the proposed MCI and Sprint merger several years ago, the size of the combined company's Internet backbone networks would hamper competition.[42] As SBC stated:

> The size of a backbone is critical because a backbone's value to its users lies in its ability to provide connectivity to the entire Internet. . . . [W]here one backbone achieves a substantial size advantage over its rivals, it necessarily "reduces the value of, and therefore the demand for, the rivals' products." At some point, "the market may 'tip,' with customers abandoning the rivals altogether because their networks are too small to be viable."[43]

AT&T likewise stated that:

> IBPs [Internet Backbone Providers] with unbalanced traffic, then, are expected to become customers rather than be peers. They can

[42] *Petition of AT&T Corp. to Deny Application*, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T, ¶ 9 (filed Feb. 18, 2000); *Opposition of SBC Communications Inc.*, CC Docket No. 99-333, at 41 (filed Feb. 18, 2000).

[43] *Opposition of SBC Communications Inc.*, CC Docket No. 99-333, at 41 (filed Feb. 18, 2000).

> do so by entering into a "transit arrangement" pursuant to which, for a fee, an Internet Backbone Provider [ ] agrees to transport the traffic to terminating points on its network or on the networks of other IBPs with whom it has a private peering relationship. Alternatively, a large IBP might agree to a "paid-for" private peering relationship allowing traffic to be terminated on its network, but the IBP paying for such an interconnection cannot represent to its customer that it has a private peering relationship. This significantly hampers its ability to compete with those that do have settlements-free private peering relationships.[44]

In addition, since Verizon and SBC will likely follow their past patterns of not competing in each other's regions, competitors in New York State and elsewhere will be forced to pay whatever peering fees they demand. Verizon will be in a position to raise fees for network access while at the same time its costs are dramatically reduced.

Applicants could also engage in myriad forms of non-price discrimination including providing other competitors problematic circuits, and providing priority routing to itself. Electronic data exchange traverses a series of points where data is converted from one medium, format, language, or technology to another. Each of these control points in the IP network would provide the merged company an opportunity to discriminate. For example, at each switch or router control over the end user's data could be exercised via firewalls, IP port forwarding, rate limiting, packet inspection and restriction, or forced caching. ATM cells flowing across any ATM network could be subject to a wide variety of controls for anticompetitive purposes. The diagram following provides a high level view of how end users served by wireless, DSL, or cable modem service connect to the IP backbone and the various control points that could be used by the merged companies to engage in non-price discrimination.

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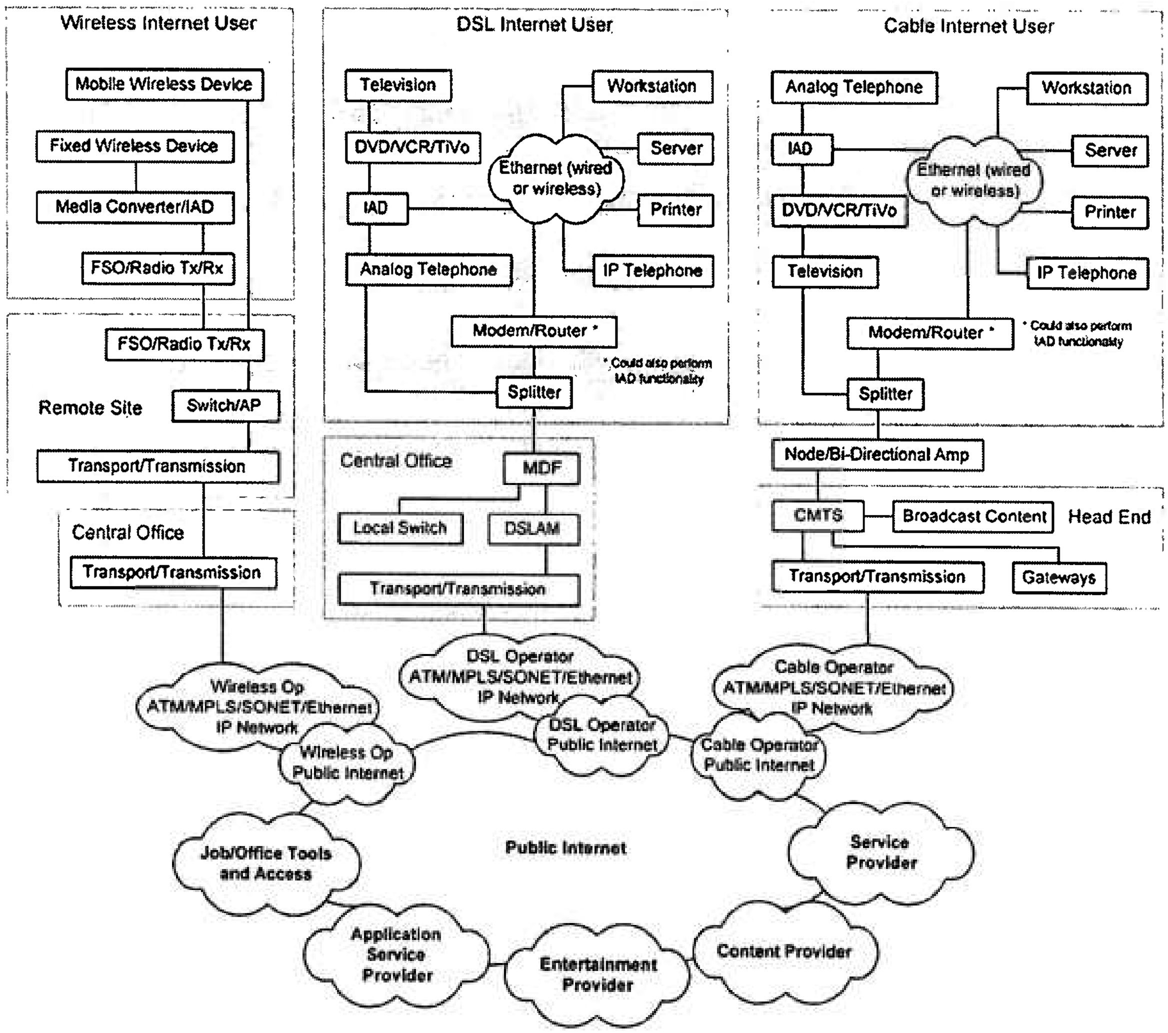
[44] *Petition of AT&T Corp. to Deny Application*, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T, ¶ 9 (filed Feb. 18, 2000) (footnotes omitted).

SIMPLIFIED HIGH SPEED INTERMODAL ACCESS TECHNOLOGIES

Darren Sandford, Pac-West
Current Revision 1.0, Apr 5 2006



Indeed, in rejecting the WorldCom/Sprint merger because of concerns about the Internet backbone market, the EU referred to the capacity of the merged entity "to discipline the market notably through the threat of selective degradation of its competitors' Internet connectivity offering."[45] It is also clear that ILECs are very capable of engaging in port blocking.[46] Accordingly, the proposed merger would enhance Applicants' ability to harm competitors in New York State through their control of IP backbone facilities.

In light of these anticompetitive effects, if the merger is permitted the Commission should require Verizon (1) to allow any IP network to peer with the merged Verizon and MCI if that network interconnects at a specified number of peering points, and (2) to provision interconnection to the IP backbone and transit service to non-peering ISPs and CLECs at LRIC rates. The Commission should also impose net neutrality requirements to preclude ILECs from blocking or providing inferior quality access to non-ILEC IP-enabled services. Further, the Commission should prohibit the merged company from imposing any restrictions or limitations on use of Session Initiation Protocol ("SIP") by its customers or services obtained from third parties by the customer. SIP is a signaling protocol used for establishing sessions in an IP network. Absent appropriate conditions, SIP could be a useful tool for discrimination by the merged company. In light of the impacts in New York State, it is appropriate to impose these conditions even though IP backbone issues also have national implications.

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[45] European Commission, Merger Case No COMP/M.1741-MCI WorldCom/Sprint, § 146.

[46] *See, e.g.*, *In re Madison River Communications, LLC and Affiliated Companies*, File No. EB-05-IH-0110, Acct. No. 200532080126, FRN: 0004334082, Order Adopting Consent Decree, DA 05-543 (2005). Madison River was blocking ports used for VoIP applications, thereby affecting customers ability to us VoIP. VZ-MCI would have the same power here, and as a competitor in the VoIP market with MCI's VoIP services this potential issue must be addressed by the Commission.

IV. RESPONSES TO STAFF SUGGESTED CONDITIONS

A. Retail Market Conditions

The White Paper sought comment on several possible conditions to address harmful impacts of the merger on the retail mass market and concluded that harmful impacts on the enterprise market should be addressed through appropriate conditions associated with wholesale market offerings designed to assure competition in provision of retail services.[47] Commenters agree that the focus of conditions should be promotion of a competitive environment, which, in turn, will bring service options and better prices to retail markets. Commenters have suggested later in these comments a number of additional conditions that would help assure a competitive environment in New York State.

B. Transport and Loop Conditions

> Staff Proposal: After the merger, MCI should 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

Verizon contends that this proposed requirement is unnecessary because "MCI already provides its wholesale services pursuant to contracts that have a usual term of a year."[48] This argument makes no sense. Regardless of the term of MCI's "usual" contracts, Staff's proposal is

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[47] White Paper at 33. Verizon objects to certain remedies because "they pertain to interstate services over which the Commission lacks jurisdiction." Verizon Comments at 46. It emphasizes that because of this, "they are governed exclusively by the FCC and that this Commission would violate federal law in attempting to regulate the rates, terms and conditions on which Verizon and MCI offer those services." *Id.* While the Commission does not have primary jurisdiction over interstate services, states may impose requirements that affect interstate communications that do not impede, and are consistent with, federal objectives. Therefore, the Commission may, as an incident to its authority over the mergers within the State of New York, require that Verizon, as a voluntary condition of the merger, to certain matters that apply to interstate communications but that will also affect the telecommunications market in the state.

[48] Verizon Comments at 47.

meant to freeze any and all rates, terms and conditions, which includes all short and long-term service offerings, that MCI currently offers its customers for a period of 36 months.

Verizon submits that there is no need to impose this requirement because small carriers that would benefit from this measure could procure wholesale services from numerous other providers in those limited areas where MCI has deployed fiber networks in New York.[49] Verizon contends that MCI as a larger carrier does not obtain additional discounts on wholesale purchases of transport from Verizon and that MCI does not make a substantial business of reselling circuits that it purchases from ILECs as special access.

Again Verizon misses the point. In order to compete effectively in light of Verizon's market power in New York State, MCI's only choice has been to offer rates, terms, and conditions for its wholesale services, such as Metro Private Line, that are likely far more competitive than Verizon's. If MCI can operate in a competitive fashion with reduced rates along with terms and conditions that are likely more favorable to CLECs than Verizon offers, Verizon should be required, as the White Paper proposes, to maintain MCI's prices and other terms and conditions. Further, MCI's rates, terms, and conditions should apply across the entire merged entity, which would include Verizon's facilities. It would serve the public interest for these rates to stay in place and be available in this manner.

> Staff Proposal: The availability of standard competitive rates, terms and conditions contained in commercial agreements between Verizon and competitive carriers would be an effective tool to ensure the competitiveness of the transport and special services market

Commenter's agree with Conversent that Verizon's existing rates, terms, and conditions in existing so-called "commercial agreements" do not reflect a realistic competitive wholesale

[49] Verizon Comments at 47.

rate for transport and loops where Verizon has and exercises dominant market power.[50] Verizon explains that these commercial offerings (which it submits fulfill its § 271 obligations) are nothing more than the terms that are available in its tariffs and that CLECs mostly purchase out of Verizon's federal special access tariffs.[51] Although this may be the case, the rates, terms and conditions that Verizon offers for such services are not necessarily just and reasonable. In fact, they are currently being investigated by the FCC because (1) Verizon is making incredible returns on such services; (2) Verizon is increasing rates rather than decreasing them under pricing flexibility; and (3) its rates far exceed benchmark forward-looking cost-based UNE rates that would exist if the marketplace were truly competitive.[52] Moreover, even though the FCC has permitted Verizon to include such rates in its tariffs, the FCC has not held that they are just and reasonable as section 202 and 271 of the Act require and this Commission should not believe otherwise.[53]

To address these concerns and as a condition to obtaining Commission approval of the merger, Verizon should offer § 271 network elements in its New York tariffs and offer such facilities at TELRIC-based rates until the Commission establishes just and reasonable rates for them. Significantly, the Maine Public Utilities Commission conditioned its support of Verizon

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[50] Conversent Comments at 16.

[51] Verizon Comments at 48-49.

[52] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* WC Docket No. 05-25 and RM-10593, Notice of Proposed Rulemaking, FCC 05-18 (rel. Jan. 31, 2005) ("*FCC Special Access NPRM*"); Comments of ATX *et al.*, WC Docket No. 05-25, at 1-13 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket No. 05-25, at 2-35 (filed July 29, 2005).

[53] *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 384, 387-89 (1932) (A carrier charging a merely legal rate (in that it was properly filed) may be subject to refund liability if customers can later show that the rate was unreasonable).

Maine's 271 application on Verizon Maine's agreement that it would do this.[54] Such a condition was imposed because the availability of a Maine wholesale tariff would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their interconnection agreements that were unrelated to the terms that they were interested in negotiating. The same concerns equally apply here. While Verizon generally contends that the Commission does not have the authority to regulate agreements to provide elements under Section 271, the public service commissions in Illinois,[55] Maine,[56] Missouri,[57] New Hampshire,[58]

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[54] *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Docket No. 2002-682, ORDER – PART II, at 8 (Me P.U.C. Sep. 3, 2004) (explaining that "[i]n [its] April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, [the ME PUC] explicitly conditioned [its] support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in [its] March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff). Verizon agreed to such conditions in its March 4, 2002 response to the Commission's March 1, 2002 letter. *See Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine*, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996, at 7 n.6 (Apr 10, 2002). *See also Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection, (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Examiner's Report, at 26-28, 33, 46-47, 51, 56, 59 (Me. P.U.C. Jun2 20, 2005) (requiring that Verizon unbundle DS1, DS3, OCn and dark fiber loops and transport pursuant to § 271 and offer such services at TELRIC-based rates in its wholesale tariff until just and reasonable rates are established).

[55] *See XO Illinois Petition for Arbitration of an Amendment to an Interconnection agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended,* Docket No. 04-0471, Amendatory Arbitration Decision, at 66-67 (Ill. C.C. Oct. 28, 2004).

[56] *Verizon Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II, at 19-20 (Me. PUC Sept. 3, 2004).

Oklahoma,[59] Tennessee,[60] and, most recently, Vermont[61] have held otherwise. Despite this, Verizon is not precluded from offering such services in its New York tariffs on a voluntary basis as it did in Maine.

> Staff Proposal: The transport market-related retail and wholesale performance metric definitions along with the special services market-related retail and wholesale carrier-to-carrier performance metric definitions should be expanded to help identify and monitor the market concentration effects of the merger and reduce discriminatory conduct.

If the merger is approved, Verizon will have both greater market power and the incentive to discriminate in its wholesale performance and quality of service offered to wholesale competitors, as the Commission found.[62] Although monitoring the "market concentration

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57 *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Arbitration Order, Case No. TO-2005-0336, at 30 (Mo. P.S.C. July 11, 2005).

58 *Proposed Revisions to Tariff NHPUC No. 84 (statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing*, DT 03-201, 04-176, Order Following Briefing, Order No. 24,442, at 50 (N.H. P.U.C. Mar. 11, 2005).

59 *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma under Section 252(B)(1) of The Telecommunications Act of 1996*, Cause No. PUD 200400497, Written Report of the Arbitrator at 199 (Okla. Corp. Comm. May 2005).

60 The Tennessee Regulatory Authority so voted on June 21, 2004 in *Petition for Arbitration of ITC Deltacom Communications Inc. with BellSouth Communications, Inc.*, Docket 03-00119. In response, BellSouth filed a preemption petition with the FCC before the TRA issued an order.

61 *Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Vermont, Pursuant to Section 252 of the Communications Act, as amended, and the Triennial Review Order*, Docket No. 6932, Arbitrator's Proposal for Decision at 28, 236-237 (Vt. P.S.B. July 15, 2005).

62 *See Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.; Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company*, Case Nos. 00-C-2051, 92-C-0665, Opinion No. 01-1, at 9 (N.Y. P.S.C. June 15, 2001) ("*NYPSC 6/15/01 Special Access Services Order*").

effects" of the merger may be necessary as Staff suggests, the Commission should take additional steps and implement safeguards to minimize discrimination that will likely occur as a result of the merger.

Such safeguards are necessary given the Commission's previous findings that Verizon provides wholesale special access services in a "discriminatory manner" [63] and that " Verizon's provisioning performance for special services is *significantly below Commission targets*, and that the record suggests *that Verizon treats other carriers less favorably than its own end users*."[64] In rendering this decision, the Commission stated that "[b]ecause Verizon's facilities are used by carriers as they are entering the market, including the local market, on a facilities basis, *Verizon's Special Services offerings are crucial for the development of facilities-based competition in the local market*, and for the New York economy."[65] Moreover, two of the Commissioners made individual statements when the order was adopted during the May 23, 2001 public meeting that reflected their level of dissatisfaction with Verizon's performance. Commissioner Bennett specifically pointed to the "difference in delays for problems with equipment, where it was 74 percent [on-time] for non-Verizon and 94 percent [on-time] for Verizon."[66] Chairperson Helmer stated that "[e]ven taking Verizon at their word, then essentially the argument is that the service is bad for everyone, so either way we don't have a good situation."

In an effort to curb Verizon's discriminatory provisioning practices, the Commission ordered that Verizon's warranty tariff be revised to apply credits for missed installation commitments to carriers as well as retail customers; construed any change by Verizon in a

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63 *NYPSC 6/15/01 Special Access Services Order* at 6.

64 *NYPSC 6/15/01 Special Access Services Order* at 9-10 (emphasis added).

65 *Id.* at 10 (emphasis added).

66 *See also NYPSC 6/15/01 Special Access Services Order* at 5.

confirmed due date as a missed commitment date; and adopted three new metrics with which Verizon must comply relating to wholesale ordering and provisioning of special access services.[67] Out of concern that the Commission did not have the authority to regulate interstate services, the credits ordered by the Commission for missed installation dates only applied to Verizon's provisioning of intrastate special access services, which is only a fraction of the total demand for circuits that Verizon provisions on an interstate basis since most carriers purchase out of Verizon's interstate rather than intrastate tariff.

At this time, the FCC is considering establishing performance measures and remedy payments that should apply to the BOCs' interstate special access services offerings;[68] however, it may be some time before any decision is rendered. While Verizon claims that "the existing retail and wholesale transport measurements more than adequately address Staff's concern that the transaction will increase concentration in the market for transport services and that Verizon will therefore have an incentive to allow the quality of its transport services to decline,"[69] they do not apply on an interstate basis, which is where the bulk of the demand exists. Therefore, in this proceeding, the Commission should not approve the Verizon/MCI merger unless Verizon agrees to expand its intrastate warranty tariff to include the services it offers on an interstate basis until such time as the FCC establishes performance measures and remedies that it is considering. Verizon should agree to such terms and recognize that this request is in spirit of establishing even handedness and fostering competition in the New York marketplace, especially given the

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[67] *NYPSC 6/15/01 Special Access Services Order* at 9-10, 20-26, 28 & App. I.

[68] *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001) (inviting comment on whether the Commission should adopt metrics to prevent discrimination in the provision of special access services).

[69] Verizon Comments at 51.

increased market power Verizon will have after the merger is approved. By imposing this condition, the Commission's enforcement and facilitation role would be no different than its role under which it regulates Verizon's intrastate special access service offering.

Commenters agree that the Commission should impose rigorous performance measures and self-effectuating remedies governing Verizon's performance in processing orders, provisioning, repairing, and maintaining special access services and UNEs for its competitors. The performance measures should be sufficiently comprehensive to assure nondiscrimination in provision of special access services.[70] In light of Verizon's past record of discrimination noted above and in the provisioning of UNEs in "no facilities" situations,[71] comprehensive performance measures should be imposed to prevent discrimination in the more concentrated market that will result from the mergers. These performance measures and other merger conditions should be enforced through self-effectuating remedies that impose liquidated damages that compensate the carriers that were injured by Verizon's violations. The liquidated damages and penalties imposed for anticompetitive practices should also escalate with multiple violations so that such damages have a deterrent effect on Verizon, rather than being an acceptable cost of doing business.

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[70] At a minimum, the required performance measures should include metrics, standards, and damages for the following parameters: mechanized provisioning accuracy, mean installation interval, order completion due date met, percent of due dates missed due to lack of facilities, percent of trouble reports within 30 days, percent of missed repair commitments, receipt to clear duration, percent of repeat trouble, percent of repeat trouble reports, percent of billing accuracy.

[71] *TRO*, ¶ 639 & n.1940 (The Commission rejected Verizon's no facilities policy and held that "with the exception of constructing an altogether new local loop, we find that requiring an [ILEC] to modify an existing transmission facility in the same manner that it does so for its own customers provides competitors access to only a functionality equivalent network.").

> Staff Proposal: Divestiture of the MCI New York transport and loop network is a practical and viable alternative to offset the increase in concentration in the transport and fiber loop network market related to the merger.

Verizon contends that divesture is unnecessary because the merger will not result in any "meaningful 'increase in concentration' that needs to be 'offset'" and it is "not practical [nor] viable."[72] Contrary to Verizon's claims, Verizon will have increased market power and dominance in the marketplace once it merges with MCI. Verizon cannot make any credible argument otherwise and Staff's conclusions based on its HHI calculations confirm this.

The Commission should therefore require Verizon to divest all of the in-region local exchange and exchange access facilities. It should also require that Verizon divest all in-region MCI residential and business customers. This is the only condition that would prevent further concentration in the local market that is already dominated by Verizon in its service territory. Verizon should be required to divest these in-region assets and customers to an unaffiliated third party identified by Verizon and approved by the Commission, the FCC, and the Department of Justice.

To the extent that divesture is not required, the Commission should at least impose structural separation requirements that are similar to those imposed under Section 272 of the Act to lessen opportunities for cross-subsidies and discriminatory conduct, and ensure that Verizon operates its MCI and Verizon long distance affiliates on an arm's length basis. Among other structural separation requirements, the Commission should require that Verizon and MCI provide interexchange services through a separate subsidiary.

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[72] Verizon Comments at 52.

Staff Proposal: Verizon should 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.

Verizon opposes this condition on the grounds that any such interconnection agreements would expire and need to be renegotiated regardless of the transaction and that the Commission lacks the authority to change a term of an agreement since the negotiated provisions are binding on the parties.[73] Contrary to Verizon's claims, Verizon's agreements have provisions that generally allow them to remain in effect beyond their initial term so long as one of the parties to the agreement does not seek to terminate it. Because of this, the proposed condition could easily and lawfully be implemented if Verizon committed that it would not terminate its agreements for the next 36 months.

Verizon also contends that it is difficult to identify any benefits from such an extension since its UNE obligations are "implemented through its New York tariff that is incorporated into virtually all interconnection agreements and that extending the agreements would not alter Verizon's current or future UNE obligations."[74] While this may be so, Verizon's new template interconnection agreement is packed full of one-sided general terms and conditions that have not been arbitrated. Rather than forcing CLECs to negotiate and arbitrate such provisions again, the terms of existing agreements - including those that have recently expired - should remain available for the next 36 months.

For instance, the arbitrated interconnection agreement between AT&T and Verizon should be made available to CLECs for this timeframe. Notably, many New York CLECs adopted this agreement and it expired on June 23, 2005. Verizon seeks, however, to terminate the agreement and opposes any request to adopt the agreement pursuant to 252(i) of the Act on

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[73] Verizon Comments at 58.

[74] Verizon Comments at 58.

the grounds that it is outdated since it does not reflect the unbundling relief granted in the *TRO* and *TRRO* and that the Commission held likewise.[75]

Verizon's argument has no merit because when Verizon's tariff pages that implemented the *TRRO* were investigated and approved, the Commission held that Verizon's UNE obligations under the tariff "automatically flow through to the [AT&T] interconnection agreement."[76] Thus, this agreement is not outdated as Verizon claims and therefore, the Commission should impose the proposed condition. In doing so, and even though the AT&T agreement is beyond its initial term, the Commission needs to expressly state that Verizon must make this agreement available for adoption pursuant to 252(i) and that its terms must be available for another 36 months for those CLECs that are currently operating under it. To the extent Verizon has issued any notices seeking to terminate the agreement, the Commission should require that Verizon withdraw them.

[75] *See Petition of DSCI Corporation for Approval of an Interconnection Agreement with Verizon New York Inc.; Petition of Conversent Communications of New York, LLC for Approval of an Interconnection Agreement with Verizon New; and Complaint of BridgeCom International, Inc. Against Verizon New York Inc. Concerning Restrictions Imposed Upon Exercise of the Right of a Competitive Local Exchange Carrier to "Opt-in" to a Currently Effective Interconnection Agreement*, Case Nos. 04-C-0647, 04-C-0679, 04-C-0739, Declaratory Ruling Allowing in Part Opt-In to AT&T's Interconnection Agreement with Verizon New York Inc, at 8-9 (N.Y. P.S.C. Sept. 28, 2004).

[76] *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC'S Triennial Review Order on Remand*, Case No. 05-C-0203, Order Implementing TRRO Changes, at 24-25 (N.Y. P.S.C. Mar. 16, 2005) (explaining that for CLECs that have interconnection agreements with provisions allowing the TRRO to be implemented via tariff changes, changes will be effected via the tariff change process and noting that the AT&T/Verizon Interconnection Agreement, for example, incorporates tariffs and envisions that tariff changes may flow through to the interconnection agreement).

V. STRONGER CONDITIONS SHOULD BE IMPOSED

As a general matter, the conditions suggested in the White Paper do not go far enough. As discussed, the Commission should address Internet backbone issues and impose appropriate conditions. As MCI has aptly stated, "[b]ecause the BOCs continue to enjoy market power in the local market, they possess the ability to extend that market power into the interLATA market, unless subject to appropriate safeguards."[77] MCI has agreed that BOC mega mergers "would enhance [Applicants'] ability to engage in anticompetitive price squeezes because it would enable them to engage in price discrimination on both ends of more calls."[78]

In order to assure competition in an environment in which the telecommunications market in New York State is not dominated by a giant Verizon/MCI, conditions should more directly address the wholesale inputs that CLECs need to compete such as UNEs and special access. The Commission should therefore impose a number of conditions on Verizon, in addition to those suggested by the White Paper.

<u>Affiliation for Purposes of UNE Rules</u>: The *TRRO's* definition of fiber-based collocator makes clear that affiliates of Verizon do not count as collocators to meet the thresholds under the new impairment test.[79] Commenters believe that MCI may have a substantial number of fiber-based collocation arrangements in Verizon wire centers. Because of this, it would be unreasonable for the Commission to include these MCI collocations as evidence of non-impairment when MCI itself has apparently determined that its business models should not continue independent of an affiliation with Verizon, and when its facilities might soon become

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77 Comments of WorldCom, Inc. d/b/a MCI, WC Docket No. 02-112, CC Docket No. 00-175, at 16 (filed June 30, 2003).

78 Comments of MCI WorldCom, Inc., CC Docket No. 98-184, at 37 (filed Nov. 23, 1998).

79 47 C.F.R. § 51.5, 51.319(a)(4)-(5) and (e); *TRRO*, ¶¶ 66, 102, 126, 129, 146, 174-180.

unavailable to competitors on any terms other than those available from the ILEC. Therefore, as a matter of common sense, practicality, and reasonableness, MCI should not be counted as an unaffiliated fiber-based collocator. For purposes of implementation of the FCC's UNE rules in New York State, this Commission should accordingly require Verizon to establish a new list of wire centers that meets the *TRRO's* fiber-based collocators non-impairment thresholds that does not include MCI and hold that this list retroactively applies insofar as Verizon has treated these collocations as unaffiliated prior to the merger.

<u>Cost-Based Access:</u> In light of Verizon's dominance in the market for special access, if Verizon is permitted to acquire MCI, Verizon should be required to implement safeguards designed to reduce the opportunities for discrimination in the provision of access to local bottleneck facilities, and other anticompetitive effects. Verizon should be required to implement, on a temporary basis, incremental cost-based pricing for switched and all special access services, including interconnection facilities at forward looking prices, until the FCC completes its existing rulemakings regarding ILEC overpricing and other anticompetitive conduct in the special access market[80] and its rulemaking to establish a unified intercarrier compensation regime.[81]

<u>Non-Discrimination in Volume Discounts:</u> The Commission should preclude Verizon from providing an unfair advantage to its new MCI affiliate and its other long distance affiliates by ensuring that Verizon cannot engage in a price squeeze by offering volume and term

[80] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, FCC 05-18, ¶ 3 (rel. Jan. 31, 2005).

[81] *See, In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, FCC 05-33, ¶ 15 (rel. Mar. 3, 2005) ("Our current classifications require carriers to treat identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis.").

discounts and other incentives for which only its affiliates (or those of other RBOCs) can qualify in the market for special access and high capacity wholesale services. To preclude this anticompetitive conduct, the Commission should impose a merger condition that requires Verizon to publish the rates, terms, and conditions of any special access services or wholesale services that it offers to MCI, its other affiliates, and other RBOCs and make such services available to competitors at the same price without the volume and term commitment that it requires of its affiliates or RBOCs. All agreements between Verizon, MCI, SBC, and AT&T for access to each others' local networks must be made available and subject to opt-in on an pick-and-choose basis.

OSS Enhancements: The Commission should require Verizon to implement an enhanced OSS by the merger closing date to provide real-time access to Verizon's databases for remote terminal location and vacant facility information for purposes of obtaining UNE loops.

VI. CONCLUSION

For these reasons, the Commission should deny the Application or impose the conditions suggested herein on any approval of the proposed merger.

Respectfully submitted

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