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Federal Communications Commission
Office of Secretary

May 25, 2005

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By Hand and ECFS

Kevin Martin, Chairman
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Re: *Written Ex Parte*: SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control (WC Docket No. 05-65); Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control (WC Docket No. 05-75)

Dear Chairman Martin:

We, the undersigned companies, Cbeyond Communications, Eschelon Telecom, SAVVIS Communications, Inc., TDS MetroCom, and XO Communications ("Companies"), are writing to ask you to ensure that the Commission takes steps to protect the fairness and integrity of its review process as it examines the two most significant merger proposals ever to come before the Federal Communications Commission. In light of the importance of the proposed mergers of SBC Communications, Inc. and AT&T Corporation, and Verizon Communications, Inc. and MCI, Inc. (together "Applicants") the undersigned Companies urge the Commission to take two steps to rationalize the review process. First, we ask that the Commission stop the clock in both proceedings, to allow both ourselves and the FCC itself time to review and understand the Applicants' submissions. Second, the Companies urge the Commission to consolidate its review of these two mergers in recognition of the fact that the issues presented by each proposed merger substantially overlap and together represent a critical re-shaping of the competitive telecommunications landscape.

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The gravity of the merger applications requires the Commission to act decisively to enable a proper review of the substance of the merger applications. If consummated, these mergers would reduce competitive choice for American consumers and business customers. The mergers would eliminate the competitive discipline that AT&T and MCI currently exert in the marketplace. These two companies are the most significant competitors to SBC and Verizon in the business market in their respective regions. Moreover, in addition to their own end-user service offerings, AT&T and MCI also offer wholesale services nationwide, both exclusively on their own facilities and by incorporating elements of SBC's and Verizon's networks with their own facilities. As importantly, AT&T and MCI offer rates and provisioning on these wholesale circuits far superior to the SBC and Verizon offerings.

* * * *

"Stopping the clock" is necessary to ensure that this Commission facilitates a rigorous review of the most significant merger proposals ever to come before the FCC. A combination of issues relating to the SBC and AT&T application indicate that the Applicants have engaged in a strategy to limit the FCC review process and potentially deny market participants, the public, and Commission staff the information needed to evaluate the transaction properly. Action now by the Commission will ensure a fair and substantive review of the proposed industry-changing mergers.

Nearly half-way through the Commission's informal 180-day review period for the proposed SBC-AT&T merger, Applicants still have not presented data and documentation supportive of their Public Interest Statement in a fashion that permits thoughtful review by interested parties. Unfortunately, the organization of the SBC-AT&T responses appears designed to thwart effective examination. The alleged confidential material supporting their initial Application, Joint Opposition, and responses to FCC data requests are inconveniently dispersed among locations at three law firms. The majority of the material, which consists of approximately 175 bankers' boxes of paper documents, have not been organized in any manner that relates logically to the points the information allegedly supports in the Application, Joint Opposition, or the Exhibits to these filings. Similarly, in general, information putatively supportive of SBC and AT&T's responses to the Commission's data requests is not identified or organized in a manner relating to the data request, Application, or Joint Opposition. We invite the Commission to send staff to the three sites to see for themselves how the responsive materials have been "organized."

SBC and AT&T have further complicated review by the restrictions they have placed on interested parties. Only one paper copy of the material is available. The documents are not available in electronic form, and are therefore not searchable. Review by any one party or group of representatives is limited to three to five-hour windows. In addition, virtually all of the supporting and responsive material is designated as "confidential" or "highly confidential," including documents that have been publicly filed elsewhere. Applicants prohibit photocopying of virtually all, if not all, pages. Soft copies of documents are not available, including numerous spreadsheets, some of which are scores of pages in length. The inability to get spreadsheets in soft form all but prevents the ability to analyze the information contained in them. Further

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exacerbating review of the data is the fact that the data on the spreadsheets are not even presented in aggregate form and are largely lacking explanation.

Visiting counsel and experts must attempt to conjure meaning from this raw data, but since photocopying is not allowed, they must conjure very quickly. Moreover, even if the data were copied by hand, for parties to analyze the data they would have to be keyed into a computer, creating the very real potential for transcription mistakes or even omissions (or retransmission of errors injected during the hand copying process). In short, the Applicants have, by presenting over 500,000 pages of documents in a disorganized and virtually unusable manner, made meaningful review impossible.

Evaluation of the data will be delayed unreasonably and materially due to these restrictions. Consequently, the reporting of any findings to the Commission and its staff will be postponed. Without a substantive change in the manner material is made available to parties, it will take a great deal of time and effort for the parties to complete their review of the responses to the Commission's data requests.

In light of the foregoing, the Commission should act now and stop the informal review clock to ensure parties and the Commission a fair and meaningful opportunity to obtain and analyze the data allegedly supporting the public interest showing offered by the Applicants. Meaningful investigation by interested parties requires access to the supporting information and a reasonable time to review that data and report finding to the Commission. Failure to allow parties an opportunity to substantively review and analyze the mountain of data proffered by the Applicants leaves the Commission's ultimate disposition, should it grant the Application, susceptible to reversal by the courts.¹ Thus, as it has in the past, the Commission should here and now stop the clock so that parties may be provided a fair and substantive review of the documents.²

¹ See, e.g., *Weyburn Broadcasting L.P. v. FCC*, 984 F.2d 1220, 1231 (D.C. Cir. 1993) (error to reach conclusion when "a full airing of the financial qualifications issue never occurred"); *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 259 (D.C. Cir. 1973) (en banc) (even in the absence of a Petition to Deny Commission has responsibility to make a public interest determination on a proper record – when Petitioners raise the issue, the FCC must investigate thoroughly); *Citizens Committee to Preserve WGKA-AM and FM v. FCC*, 436 F.2d 263 (D.C. Cir. 1970) (error for Commission to refuse to investigate disputed material fact).

² Letter of W. Kenneth Ferree to Pantelis Michalopoulos and Gary M. Epstein, March 7, 2002, <http://www.fcc.gov/transaction/echostar-directv/fccextensionletter030702.pdf>. ("stopping the clock" on Echostar/DirecTV merger until Applicants provided requested information); Letter of Christopher Wright, FCC General Counsel, to Arthur Harding and Peter Ross, March 6, 2000, <http://www.fcc.gov/mb/aoltw/aoltwextlet.doc> (declining to consider AOL/Time Warner Application until Applicants submitted information relevant to the broadband market and other concerns).

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We also urge the Commission to consolidate its review of the proposed merger of AT&T and SBC with that of Verizon and MCI. Consolidating review of the SBC-AT&T and Verizon-MCI merger applications will increase administrative efficiency and reflect the reality that the two mergers are interrelated and should be processed together as a substantive matter. Indeed, the paradigm-shifting nature of these two transfer applications, which were filed within days of each other, underscore the need for the Commission to act only after a thorough and deliberate review of the underlying data is undertaken and the many and multifaceted ramifications of the proposed deals are fully examined.

SBC and Verizon are attempting to simultaneously remove their two largest competitors from the market. These mergers would reduce competitive choices for every American consumer, and every business in the country. If permitted to merge with their only meaningful competitors, these two giants would control 80% of the nation's wireline business market, more than 63% of all ILEC lines, and more than half of all wireless subscribers nationwide. Furthermore, SBC and Verizon would eliminate AT&T and MCI as the two primary independent wholesale local networks in the country, as well as the two firms who are best situated to aggregate and resell SBC and Verizon special access in combination with their own facilities, inputs that are critically important to other competitors in both of these regions.

Separate and apart from the examples of delayed submissions of relevant information and supporting data by SBC and AT&T, and the continued restrictions on access to that material, the typical 180-day merger review cycle simply is not applicable to two interrelated transactions of this magnitude. The informal review clock, applied in this case, complicates the ability of the Commission and third parties to do their job by putting artificial constraints on the process. It sends misleading signals to other federal and state regulatory agencies who are engaged in their own merger reviews without such artificial procedural schedules. Finally, if left in place, it will encourage further gamesmanship related to the production of documents from the merger parties.

Consistent with the Commission's Rules, 47 C.F.R. § 1.206(b), an original and two copies, for each proceeding, have been submitted to the Secretary.

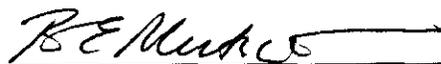
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Please contact the undersigned should you have any questions or to discuss.

Respectfully submitted,



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