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June 6, 2005

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written Ex Parte Presentation
DA 05-656, WC Docket No. 05-65/
DA 05-762, WC Docket No. 05-75

Dear Ms. Dortch:

On May 9, 2005, representatives of Eschelon Telecom (“Eschelon”), NuVox Communications (“NuVox”), TDS Metrocomm (“TDS”), XO Communications (“XO”), and Xspedius Communications (“Xspedius”) (herein, the “*HIA* CLECs”), including the undersigned, met with Scott Bergmann, Legal Adviser to Commission Adelstein, regarding their concerns over the proposed merger of SBC Communications, Inc. and AT&T Corp. (collectively, the “Applicants”).¹ As part of that presentation, the *HIA* CLECs provided an analysis of the significant impacts of the Applicants’ merger on horizontal competition in wholesale and retail

¹ Ex Parte Letter from Brad Mutschelknaus, Kelley Drye & Warren LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-65 (May 10, 2005) (attaching Presentation by Professor Simon J. Wilkie, “SBC/AT&T: Preliminary Analysis of Competitive Effects” (“*Horizontal Impacts Analysis*”). Earlier that same day, representatives of the *HIA* CLECs also met with Commission staff regarding the same subject matter. Ex Parte Letter from Edward A. Yorkgitis, Jr., Kelley Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-65 (May 10, 2005) (attaching Presentation by Professor Simon J. Wilkie, “SBC/AT&T: Preliminary Analysis of Competitive Effects”).

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markets prepared by Professor Simon Wilkie, former Chief Economist of the Commission (the “Horizontal Impacts Analysis”). On May 17, 2005, the Applicants submitted a written *ex parte* attempting to point out flaws underlying the *Horizontal Impacts Analysis*.²

This letter responds to the Applicants’ arguments and is filed on behalf of XO, Eschelon and Xspedius (collectively, the “Responding CLECs”). As discussed herein, AT&T and SBC do not question in any material way the methodological approach of the *Horizontal Impacts Analysis*. The *SBC May 17 Letter*, to be sure, does make the claim that “the merger would not materially increase concentration in the provision of special access services,” *i.e.*, DS1 and DS3 interoffice channel mileage and termination services.³ The Applicants, however, do not take issue with the analytic method the *Horizontal Impacts Analysis* offered to test the validity of these claims. Nor do they challenge the HHI numbers that were included in the presentation, which show a significant concentration in the industry as a result of the AT&T merger in combination with the pending MCI and Verizon merger. Instead, SBC and AT&T focus their attention on the data used in the analysis, and the *SBC May 17 Letter* disputes the quantitative and competitive significance of the horizontal combination of these assets. The Applicants, thus, at least tacitly, agree that Professor Wilkie has correctly framed the antitrust issues pertaining to the wholesale provision of local access. The relevant question now is what data should be used within that analysis.

Although the Applicants claim that the data used in the *Horizontal Impacts Analysis* are flawed, a close review of SBC’s and AT&T’s claims reveals that they mischaracterize the data used in the *Horizontal Impacts Analysis*. While the Applicants offer their own data, these data fail to reflect relevant markets for a proper antitrust/competitive impact analysis. Finally, the *SBC May 17 Letter* grossly understates the extent of AT&T’s competitive presence – distorting the reality in wholesale markets experienced by the Responding CLECs and other carriers on a regular basis – and thus substantially underestimates AT&T’s actual and potential ability to constrain SBC’s prices for interoffice transport and loops.

1. The *SBC May 17 Letter* Fails to Counter the *Horizontal Impacts Analysis*’s Demonstration that AT&T’s Competitive Presence in Relevant Geographic Markets Is Substantial.

² Letter from Lawrence J. Lafaro, AT&T Corp., and Gary L. Phillips, SBC Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-65 (May 17, 2005) at 2 (“*SBC May 17 Letter*”).

³ *Id.* at 1.

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- a. *The Applicants' criticisms of the data are not grounded in proper geographic markets.*

An underlying and persistent flaw in the *SBC May 17 Letter* is its failure – to analyze the data on anything other than an SBC region-wide basis. The Applicants do not say why data regarding the indicia of the competitive presence of AT&T, and those of other CLECs, should not be examined on anything other than the SBC region, taken as a whole. Far more plausible and appropriate market definitions exist for antitrust and competitive impact analysis purposes, such as Metropolitan Statistical Areas (“MSAs”) or even smaller areas. Dr. Wilkie, for example, in his *Horizontal Impacts Analysis*, examines much of the data at an MSA level.⁴ Instead of addressing the data as they relate to the geographic market identified by Dr. Wilkie, the Applicants make their criticisms from the perspective of the SBC region as whole. For example, they state that “AT&T accounts for only a small fraction of the CLEC-owned building connections *in the SBC region*,”⁵ and that “the merger would not materially increase concentration in the provision of special access services and would benefit, not harm, consumers of special access services. . . .”⁶ By looking at the SBC region as a whole, the Applicants’ claims, even assuming they are factually supported, are vacuous from the perspective of antitrust and competitive impact analysis.

For example, AT&T and SBC claim that AT&T purchases wholesale private line service from over 25 CLECs in the SBC region, but apart from identifying the CLECs, they do not provide (1) any more detailed information regarding the relevant geographic markets (*i.e.*, “MSAs”) in which AT&T purchases these services; (2) whether and to what extent AT&T has its own facilities in any of those markets; (3) the volume of private line services that AT&T purchases from these CLECs as a whole or individually in the relevant markets; (4) the capacities of these private line services (*i.e.*, whether they are DS1 or DS3); (5) whether the facilities are interoffice transport or loop; and (6) what percentage of all of AT&T’s interoffice transport or loop demands are provided by these CLECs. Without providing this ancillary information, the statement that AT&T purchases private line services from more than 25 CLECs

⁴ See, e.g., *Horizontal Impacts Analysis* at 6-11, 13-15, 31-34.

⁵ *SBC May 17 Letter*, at 2 (emphasis added).

⁶ *Id.* at 1.

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in the SBC region is of no assistance in conducting any assessment of horizontal impacts of the proposed merger and does not rebut any portion of the *Horizontal Impacts Analysis*.⁷

The Applicants further claim that CLECs (as a group) have constructed facilities to several times the number of buildings than AT&T has.⁸ The *SBC May 17 Letter* claims that the number of “CLEC-owned building connections” was determined by examining “lists of the specific buildings [CLECs] can serve with their own facilities.”⁹ The lists in question have not been made readily available.¹⁰ Unless the *HIA* CLECs and other interested parties can obtain copies of and review these lists, especially what the lists purportedly contain about individual CLEC-own building connections, it is unclear whether the lists include buildings served by CLECs with fiber leased from SBC or AT&T or building where CLECs represent a wholesale alternative for other competitive carriers, as the Applicants appear to claim.¹¹ It is also unclear the extent to which the lists include connections from CLECs other than AT&T in the relevant MSAs. But in any event, without information on the appropriate market-based level, the region-wide statement regarding the total number of buildings served by CLECs does not assist the Commission in completing an antitrust or public interest analysis.

- b. *The Applicants improperly characterize the HIA CLECs’ data and ignore the competitive presence of AT&T via use of Type II facilities.*

⁷ Similarly, no meaningful market concentration statistic, such as the HHI, can be calculated on the basis of firms’ shares of wholesale local access in SBC’s entire service area.

⁸ *SBC May 17 Letter* at 2.

⁹ *Id.*

¹⁰ Initial examination at the Applicants’ three law firms designated as repositories of the allegedly highly confidential material supporting the Applicants’ public filings and representing their responses to the Commission’s requests for information indicate the presence of several extensive building lists. But meaningful review of these lists is almost completely undermined because the Applicants prohibit photocopying and have not made the lists available in electronic, and therefore computer-searchable, form.

¹¹ For example, suppose AT&T has its own DS3 (or higher) level fiber circuit connected to a given building, and AT&T has channelized that fiber and re-sold a DS1 level fiber circuit connection to a CLEC. If a list reflected that CLEC connection, the list would over estimate the number of buildings served by CLECs with facilities that they own relative to AT&T.

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The *SBC May 17 Letter* chides the *Horizontal Impacts Analysis* for suggesting that AT&T has thousands of exclusive connections to buildings in relevant markets within SBC territory.¹² As was clear in the *Horizontal Impacts Analysis*, the *Analysis* included not only those buildings to which AT&T was the sole CLEC with its own end-to-end physical links (so-called “Type I connections”), but it also included those connections that are realized, at least in part, through purchase of SBC special access. As AT&T and SBC have explained, AT&T does not provide connections to buildings that solely ride SBC special access facilities which AT&T then resells. Instead, AT&T uses SBC special access for only one component of three used to make an AT&T Type II connection, namely a channel termination on one end of the circuit. While the *SBC May 17 Letter* focuses solely on Type I connections, the fact that AT&T supplies most of the facilities involved in an AT&T Type II connection both underscores the extensive network-based reach of AT&T fiber compared to those of other CLECs and reveals that focusing solely on Type I connections, as SBC and AT&T would have the Commission do, grossly understates AT&T’s competitive presence in the relevant markets.¹³

The Applicants contend that such connections should not be counted, yet they provide no explanation why not. As explained in the *Horizontal Impacts Analysis*, as well as the *Petition to Deny*, in which the Responding CLECs joined, AT&T is able to constrain, to some degree, SBC’s pricing through such Type II facilities.¹⁴ AT&T’s revelation that Type II facilities are provided, but for the “channel termination” portion to the building on AT&T’s own facilities, demonstrates both why AT&T’s competitive presence cannot be measured solely on the basis of AT&T-owned building connections and how AT&T is able to leverage the discount it receives from SBC for special access to offer competitively low prices in the wholesale market.

¹² *SBC May 17 Letter* at 2.

¹³ The subtext of the Applicants’ arguments is that AT&T has deployed only modest fiber network facilities for the provision of local services. However, AT&T’s own documentation suggests otherwise. As stated in the attached excerpt from AT&T’s January 25, 2005, Network Continuity Overview, AT&T has deployed over 21,000 fiber miles for local services, over 25% of all of the fiber miles AT&T has deployed. AT&T notes that it has 158 *local* switches and 8,200 metropolitan SONET rings. Moreover, AT&T states that it has over 6,250 direct connections to buildings and customer connections with high capacity fiber. The full AT&T Network Continuity Overview is available online at http://www.att.com/ndr/pdf/cpi_5181.pdf.

¹⁴ *Petition to Deny of CBeyond Communications, Conversent Communications, Eschelon Telecom, NuVox Communications, TDS Metrocom, XO Communications and Xspedius Communications* at 22-30, WC Docket No. 05-65 (April 25, 2005) (“*Petition to Deny*”); see also Exhibit A to *Petition to Deny: Declaration of Simon J. Wilkie* at 7-12 (“*Wilkie Declaration*”).

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Interestingly, *AT&T does not deny the accuracy of the Type II numbers provided by the Horizontal Impacts Analysis.*

While the Applicants seek to summarily dismiss the competitive presence achieved through Type II facilities as irrelevant to any antitrust or competitive impact analysis, AT&T does concede that it has direct connections through its own facilities to almost **[Highly Confidential – Subject to Protective Order]** _____ **[Highly Confidential – Subject to Protective Order]** buildings in the SBC region where it is the only CLEC present: “Specifically, AT&T has direct connections to only **[Highly Confidential – Subject to Protective Order]** _____ **[Highly Confidential – Subject to Protective Order]** commercial buildings in the SBC region, and **[Highly Confidential – Subject to Protective Order]** _____ **[Highly Confidential – Subject to Protective Order]** of these are already served by CLECs as well.”¹⁵ With respect to the provision of loops in these buildings, this raises serious concerns that the concentration of service providers in individual wire centers would increase substantially following the proposed merger. With respect to local transport, the buildings may be nearest to central offices where SBC and AT&T are the only or primary providers of interoffice transport between LEC wire centers. As indicated by the HHI calculations in the *Horizontal Impacts Analysis*, because of the tremendous demand in buildings, including central offices, with direct connection, even this seemingly small number of buildings with direct connections has a disproportionately large competitive effect in the relevant markets.

The Applicants’ steadfast refusal to recognize the competitive significance of Type II facilities leads them to dismiss out of hand the *HIA* CLECs’ MSA-specific analyses provided with the *Horizontal Impacts Analysis*. For example, the *SBC May 17 Letter*’s principal comment on the *Horizontal Impact Analysis*’ Milwaukee data is to note that Type II facilities were included. While true, that does not significantly diminish the competitive significance of AT&T’s presence or account for the important role played by those facilities in the wholesale market.

The *SBC May 17 Letter* also states incorrectly that the *Horizontal Impacts Analysis* relied on GeoResults data, which AT&T claims is incomplete, causing the *Analysis* to over-count AT&T’s connections to buildings in the SBC territory.¹⁶ The *SBC May 17 Letter* is unclear as to whether this complaint refers only to the statements in the *Horizontal Impacts Analysis* regarding AT&T facilities in the Milwaukee area or to all statements regarding AT&T facilities in the *Horizontal Impacts Analysis*. In point of fact, Professor Wilkie’s HHI calculations do *not* rely on

¹⁵ *SBC May 17 Letter* at 2.

¹⁶ *Id.*

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lit building list information from GeoResults. While Professor Wilkie does make use of GeoResults data regarding the total telecommunications bandwidth demanded by buildings in Chicago, his primary sources for information regarding the buildings served by AT&T and other carriers are various “on-net” building lists provided to CLECs by the wholesale carriers themselves.¹⁷ Professor Wilkie’s understanding is that such lists are provided to CLECs by AT&T and other providers of wholesale local access in order to identify for the CLEC which customer locations can be served by the provider’s facilities. Presumably, AT&T is not intentionally misleading CLECs regarding the number of buildings to which it can provide wholesale local access service.¹⁸ Because AT&T has every incentive to provide wholesale customers with lists that are as up-to-date and accurate as possible, the information on which the *Horizontal Impacts Analysis* should be deemed reliable.

2. The SBC May 17 Letter Overstates the Ability of CLECs to Replicate AT&T Fiber to Buildings.

¹⁷ Professor Wilkie has collected building list information for Chicago from the GeoResults database but relies primarily on lit building list data provided by AT&T and other carriers to the CLECs. One would expect slight differences among building lists prepared at different times or provided to competitive carriers with differing service areas, however, so Professor Wilkie also created share and HHI estimates using a combination of all building lists available to him at the time (including the GeoResults information). As discussed in his presentation, however, combining building lists added only one site to his calculations when the focus was on high-use buildings, increased AT&T’s share only slightly, and did not have a material effect on his findings. Notably, such building list data were provided by carriers to Professor Wilkie in his capacity as consultant to the company on the express condition that the specific building addresses be kept strictly confidential and not revealed to any third party.

¹⁸ To the best of our knowledge, SBC and AT&T have not asserted that the information previously provided to CLECs by AT&T regarding the number and location of its on-net buildings and central offices was or is incorrect. If they now make such a claim, however, they should provide data sufficient to test their contention. Our understanding is that SBC’s and AT&T’s responses to the FCC’s April 18, 2005, information request was to include detailed spreadsheets regarding AT&T’s wholesale local access and interoffice transport facilities throughout SBC’s incumbent service territory. Even if this detailed information is available, it has been provided in a manner that prevents effective analysis. For example, the Applicants have apparently made the data, presumably which exists in electronic Excel spreadsheet form internally, available only in hardcopy form and without aggregated totals or some other summary. In addition, the two parties have prohibited any photocopying or imaging of the hardcopy spreadsheets, which are available only for viewing at one law firm office in Washington, D.C., and only for a few hours at a time upon prior appointment.

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The Applicants claim that other CLECs can readily replicate AT&T connections “in all or virtually all of the . . . buildings where AT&T is the only CLEC with [Type I] direct connections.”¹⁹ At the outset, it is important to note that this claim is based on flawed reasoning equating the FCC’s impairment analysis with the analysis of competitive harm required pursuant to the DOJ-FTC Horizontal Merger Guidelines. The Commission’s impairment test is not the same as the entry test in the DOJ-FTC Horizontal Merger Guidelines, which asks “whether timely and likely entry would be sufficient to return market prices to their premerger levels.”²⁰ The impairment analysis is based on the current ability of a CLEC to obtain facilities to serve a customer. The competitive harm analysis, in contrast, examines the totality of the harm that would ensue from the removal of AT&T’s competitive presence from the market. There is absolutely no way that any CLEC can replicate this competitive presence within the time frame deemed relevant under the Merger Guidelines. In fact, the Commission must now take into account to what extent the presence of AT&T (and MCI) facilities were relied on for its competitive impairment findings. CLECs cannot replicate the AT&T (and MCI) networks. After all, AT&T has taken decades, spent billions of dollars, and used its extensive relationships with customers and vendors to create this presence. Thus, the impairment analysis should not be used by the FCC to determine the potential for competitor to enter and ameliorate the substantial competitive harms that arise from this merger.

Even assuming the Applicants’ use of impairment analysis is proper, it still does not refute the *Horizontal Impact Analysis*. As the Applicants explain, in those buildings where AT&T has direct connections, it is providing OCn-level, or near-OCn-level, connections. The premise of the Applicants’ argument seems to be that, because the FCC has found non-impairment for OCn-level transmission facilities, there are simply no transaction costs for other CLECs to gain access to the buildings. This simply is not the case. As an initial matter, most CLECs, as potential wholesale customers, are interested in gaining access to a building at the DS1 and DS3 level. Replication of AT&T’s OCn facilities is simply not an economically viable alternative. Thus, the Applicants’ reference to the FCC’s decisions in the *Triennial Review Order* and *Triennial Review Remand Order* regarding non-impairment of OCn facilities is simply beside the point. If OCn, DS3, and DS1 facilities were reasonably interchangeable in use, the Commission would have found non-impairment for all DS3 and DS1 facilities at the same time it did so for OCn facilities, which it did *not* do.

¹⁹ *SBC May 17 Letter* at 3.

²⁰ U.S. Department of Justice and Federal Trade Commission HORIZONTAL MERGER GUIDELINES, § 3.0.

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The Applicants also claim that, even at the DS3 and DS1 level, the Commission has found that “in the most dense urban wire centers” CLECs are not impaired without access to unbundled transmission facilities at these levels. Applicants conveniently ignore that the majority of customers are not served by such “most dense urban wire centers,” and that impairment still exists, under the *Triennial Review Remand Order* regulations, in significant numbers of wire centers because of the absence of sufficient competitive facilities. Moreover, in the new world where AT&T and MCI will be acquired by the two largest RBOCs, before the Applicants can rely on non-impairment findings under the *Triennial Review Remand Order in this proceeding*, the Commission must take into account whether the presence of AT&T or MCI facilities were needed to cross the non-impairment line in the first place. Not only is the Commission’s decision to make the finding of non-impairment in a particular wire center irreversible pending reconsideration, but even if that decision remains unchanged, the decision to rely on the presence of AT&T and MCI facilities for purposes of unbundling at a specific point of time *cannot* simply be transferred to a merger application public interest analysis where the very focus of the Commission’s evaluation is how the relevant markets will change and what the competitive impact will be.

Furthermore, the Applicant’s claims regarding the replacement of OCn or the installation of DS3 and DS1 facilities by CLECs overlooks practical realities which, at best, will lead to delays before CLECs have access to the buildings from any provider other than SBC. Any CLEC seeking to install facilities in a building would have to negotiate access with the building owner, may have to obtain additional authority for use of both private and public rights of way to gain physical access to the property, and would have to make new capital expenditures to reach the building. In the interim, the merged firm would have the ability to raise interoffice transport and loop prices by a small but significant and nontransitory amount, thereby exercising substantial market power.

3. The SBC May 17 Letter Ignores the Reality of AT&T’s Extensive Participation in Wholesale Bid Processes, Including by Leveraging its Ability to Combine Discounted SBC Special Access with its Own Facilities.

In addition to arguing that they have access to fewer buildings than the *Horizontal Impacts Analysis* has suggested by ignoring Type II facilities altogether, the Applicants also countered that AT&T receives no special discount because of its size and the volume of special

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access services it purchases from SBC.²¹ Further, AT&T claims that it is not a key wholesale supplier of transmission services because its local access facilities “were designed and deployed primarily to service its own retail customers,”²² and because it has “minimal” private line revenues.²³ The experience of the Responding CLECs belies these claims and shows that, both through its own facilities and those used in combination with SBC’s special access, AT&T is a principal supplier of wholesale services, and that its role as frequent bidder to supply CLECs with wholesale transmission inputs places competitive pressure on SBC’s prices.

Regardless of the purported intent behind the original design and deployment of AT&T’s local access and interoffice transport facilities, the Commission’s focus, of course, must be on how those facilities are currently being used (and are likely to be used going forward) and to what extent the presence of those facilities restrains SBC prices in local access and interoffice transport markets. As was highlighted in Professor Wilkie’s Declaration attached to the *Petition to Deny*, and the *Horizontal Impacts Analysis*, there is considerable evidence to suggest not only that AT&T is a significant provider of wholesale local access and interoffice transport, but also that the presence of AT&T as a wholesale provider tends to result in significantly lower prices.²⁴

To begin with, the Applicants’ claim that it is neither a frequent bidder nor a significant provider of wholesale services is contradicted by the Responding CLECs’ experience which indicates that AT&T offers to provide wholesale interoffice channel mileage and termination services on thousands of different circuits throughout the SBC region. Data provided by CLECs demonstrate that AT&T bids for the provision of wholesale local access service in competition with the incumbent local exchange carrier and other wholesale providers. Such data maintained by the Responding CLECs after soliciting service confirm that AT&T routinely participates in, and often wins, such bidding situations. One competitive provider recently solicited pricing offers for a very substantial number of high-capacity transport routes nationwide. AT&T responded with a pricing offer for over 70% of the routes (both Type I and Type II circuits). (If only Type 1 circuits were included, AT&T offers covered approximately 30% of the routes.) Although this is but one set of responses to one CLEC, it is hardly anecdotal; indeed, it demonstrates that AT&T actively responds to wholesale inquiries on thousands of interoffice

²¹ We explained earlier herein how the combination of ILEC special access channel termination services with AT&T’s own extensive interoffice fiber facilities enables AT&T to offer, in a significant number of instances, unbeatable low cost circuits.

²² *Id.* at n.13

²³ *Id.*

²⁴ See *Petition to Deny* at 19-30; *Wilkie Declaration* at 5-13.

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transport circuits. In our view, this is behavior inconsistent with an assertion that AT&T does not use its local facilities, whether Type I or Type II, to provide wholesale service.

Concerning Type II facilities, the Applicants fail to appreciate Professor Wilkie's point. Even where AT&T provides Type II wholesale local access service instead of service provided entirely over its own facilities, and even where it is *not* the winning bidder, its presence as a competing bidder disciplines resale rates and contributes to winning bids substantially lower than the special access rate offered by the ILEC. The example provided in the *Horizontal Impacts Analysis*, where MCI and Sprint also bid, illustrates a simple fact: when CLECs offer loop facilities on a Type II basis, *i.e.*, without using their own facilities, the presence of AT&T tends to lead to lower bids. AT&T's presence as a reseller of ILEC facilities tends to lead to lower prices for DS1 circuits offered on a Type II basis, all else being equal. Were AT&T (and MCI) to be removed as bidders, the number of situations in which only SBC and one CLEC were to bid would rise dramatically. As Professor Wilkie explained in his Declaration attached to the *Petition to Deny*, in that situation, the CLEC's incentive in the absence of other CLEC bids, would be to bid just under the SBC special access price. This illustrates the important role that AT&T plays in the wholesale market in keeping prices down to allow retail competition to develop, and the magnitude of the likely price increases that would occur if the merger were approved.

4. The SBC May 17 Letter Provides No Evidence Supporting its Contention that the Historical Mutual Forbearance Between SBC and Verizon Likely Will Cease.

Finally, the Applicants claim that they will not engage in tacit collusion with Verizon. Specifically, the *SBC May 17 Letter* argues that, "there is no basis for opponents' fear that the combined SBC/AT&T will engage in 'tacit collusion' or 'mutual forbearance' with respect to any customers, whether retail or wholesale, business or residential."²⁵ After offering several excuses as to why it has competed almost exclusively within its historical boundaries to date, or stated otherwise, why "SBC's national/local business plans have thus far fallen short of expectations,"²⁶ the Applicants confidently proclaim that "[w]ith the acquisition of AT&T, all of this will change."²⁷

²⁵ *SBC May 17 Letter* at 5.

²⁶ *See SBC May 17 Letter* at 5.

²⁷ *Id.*

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While the Applicants claim that SBC does not have a history of mutual forbearance with Verizon, the facts as described in the CLECs' Petition to Deny in which the Responding CLECs participated demonstrate otherwise.²⁸ As Professor Wilkie has explained, this record of tacit collusion between SBC and Verizon has been economically rational, albeit competitively harmful. The tremendous size and scope of SBC's and Verizon's respective local operations means that they risk a great deal by engaging in facilities-based competition in local access markets in each other's service areas. Suppose that, for example, SBC incrementally expanded its local access facilities in Verizon's service area. The profits accruing to SBC from that incremental expansion likely would be substantially less than the reduction in SBC's profits if Verizon were to respond by entering on a large scale, facilities basis into local access markets in SBC's territory. With SBC's acquisition of AT&T, and Verizon's acquisition of MCI, *none of this will change*. The Responding CLECs recognize that AT&T and MCI (in their new incarnations) are likely to continue to provide facilities-based services to existing customers in Verizon's and SBC's territory, respectively. But there is little economic incentive to become a full-scale competitor taking advantage of the new RBOC backing because the net change is likely to be a loss of profits for each company. In short, each company will be an emaciated competitor in the other's region, in contrast with AT&T and MCI today.

Further, the Applicants other points regarding the characteristics of today's business marketplace do not require a different conclusion.²⁹ While the needs of business customers are heterogeneous, this is only at the level of individual customers. In terms of the full suite of services offered by a super-large telecommunications company such as SBC or Verizon – as opposed to a more specialized CLEC – or the demand of business customers viewed from a large scale perspective, the situation is quite homogenous. Further, while it is true that some customers may use and prefer different sets of competitors, there is little evidence, and the Applicants provide none to the contrary, that this phenomenon is widespread enough that SBC or Verizon, post-merger, would risk its in-region profits to meet the needs of the relatively small number of customers that prefer them over Verizon. If that were the case, SBC should have more evidence of customers in Verizon's home territory that prefer SBC than it has offered to date.

²⁸ See *Petition to Deny* at 44-59; *Wilkie Declaration* at 13-19.

²⁹ See *SBC May 17 Letter* at 6-7.

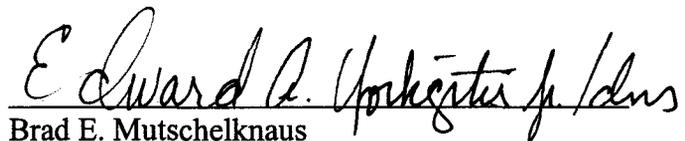
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5. Conclusion.

Applicants' *SBC May 17 Letter* is a blatant attempt to distort the case made by Professor Wilkie in the *Horizontal Impacts Analysis* and mislead the Commission on the important role that AT&T (and MCI) facilities play in the current marketplace for competitive local telecommunications services. Applicants' protestations must be taken for what they are – a continued desperate attempt to make everyone believe that the world is flat by simply saying it often and loudly enough, while they themselves embark on efforts to increase SBC's dominance in significant and lucrative segments of the real world.

Respectfully submitted,



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