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August 10, 2005

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

*Ex Parte*

WC Docket Nos. 05-65, 05-75

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this will provide notice that on August 9, 2005, Richard M. Rindler of this firm and the undersigned, representing ACN Communications Services, Inc., ATX Communications, Inc., Biddeford Internet Corporation d/b/a Great Works Internet, Bridgecom International, Inc., Broadview Networks, Inc., BullsEye Telecom, Inc., Cavalier Telephone Mid-Atlantic, LLC, CTC Communications Corp., Gillette Global Network, Inc., d/b/a Eureka Networks, Granite Telecommunications, Inc., Lightship Communications, LLC, Lightwave Communications, LLC, Lightyear Network Solutions, LLC, Pac-West Telecomm, Inc., USLEC Corp., U.S. Telepacific Corp. d/b/a Telepacific Communications, met with Russell Hanser, Office of Commissioner Kathleen Q. Abernathy, Scott Bergmann, Office of Commissioner Jonathan S. Adelstein, and Jessica Rosenworcel, Office of Commissioner Michael J. Copps concerning issues in the above-captioned proceedings. We presented the views set forth in the attached document which was provided at the meeting.

Sincerely,



Patrick J. Donovan

**SBC/AT&T**  
**Verizon/MCI**

**Concerns/Proposed Conditions**

WC Dockets Nos. 05-65, 05-75  
August 9, 2005

# APPLICANT CLAIMS NOT CREDIBLE

- AT&T and MCI do not have significant in-region local assets.
  - AT&T and MCI have 21,000 and 9,000 nationwide local route miles, respectively. (BOC UNE Fact Report, WC Docket 04-313, III-4.
  - AT&T and MCI have about 50% of local fiber routes nationwide. (*Id.*)
- AT&T and MCI are not significant independent providers of access service.
  - AT&T and MCI sell special access at rates that “typically were 15%-30% below, and sometimes more than 35% below, SBC’s tariffed rates.” (SBC TRO Reply Comments, filed 10/19/2004, at 44-46)

# APPLICANT CLAIMS ARE NOT CREDIBLE

- AT&T and MCI local networks could be easily duplicated by CLECs.
  - Constructing local network facilities is time consuming, capital intensive, and very difficult for a number of reasons. (*See generally*, AT&T TRRO Comments)
- The mergers will not diminish competition in the mass and enterprise markets.
  - AT&T and MCI will exit the market as independent providers of wholesale, retail, and IP backbone services.

# APPLICANT CLAIMS NOT CREDIBLE

- The mergers do not increase the risk of price discrimination and price squeeze behavior.
  - SBC and Verizon will become facilities-based IXCs, creating new incentives and opportunities to discriminate.
- Risk of fines will preclude non-price discrimination.
  - SBC paid record fines in connection with its previous merger.

# **POTENTIAL HARMS SHOULD BE ADDRESSED IN THE MERGER PROCEEDINGS**

- Rules of general applicability are not suitable for addressing merger specific harms:
  - Loss of competition
  - Increased ability to discriminate, engage in price squeeze behavior.

# REGULATORS MUST CONSIDER TRENDS

- Other BOCs could acquire remaining facilities-based IXCs
  - Sprint local operations will be spun off after Nextel merger
  - Independent facilities-based long distance industry may not survive
- Other BOCs could acquire other Internet backbone providers (also issue of last mile)
  - Level 3 recently removed its “poison pills”
  - Sprint, as noted above
- Pending mergers must be considered together

# BOCs POSSESS MARKET POWER

- CLECs have no alternative to ILEC facilities in the vast majority of situations
- AT&T and MCI are two of the larger providers of alternative facilities.
- FCC recently found in the *Triennial Review Remand Order* that CLECs are impaired with respect to DS1 and DS3 loops and transport based in part on number of fiber-based collocators.
  - Mergers could skew impairment threshold if AT&T (or MCI) fiber-based collocations counted as unaffiliated, reducing the availability of UNEs.

# CONCERNS

- Discrimination in provision of facilities
- Diminished choice in competitive access providers
- Acquisition of in-region customers
- Loss of independent facilities-based IXC's
- Concentration in, and access to, IP backbone

# DISCRIMINATION

- Price squeeze behavior
  - SBC can charge high access prices to its affiliate without harm because they are transfers within the affiliated enterprise
  - Volume, “growth,” discounts for which only the IXC affiliate could qualify
    - Growth commitments are barriers to entry
  - Region-wide purchase agreements

# DISCRIMINATION (Cont'd)

- Price squeeze behavior (cont'd)
  - BOCs have been raising special access prices under pricing flexibility
  - BOCs have been successful in gaining long distance market share by setting long distance prices low in relation to access.
  - Bundling facilitates discrimination.

## **DISCRIMINATION (Cont'd)**

- **Untimely and substandard ordering, provisioning, repair, and maintenance**
  - “Integration” of IXC and ILEC facilities would make detection of discrimination difficult or impossible
- **Previous discrimination validates the concern**
  - FCC in 2003 TRO found that restrictions on commingling and Verizon’s “no facilities” policy were unlawfully discriminatory
  - NYPSC found in 2001 that Verizon discriminated in provision of special access

# **DIMINISHED CHOICE IN COMPETITIVE ACCESS PROVIDERS**

- SBC and Verizon will be acquiring the largest competitive special access providers
- Increased dependence on ILECs
- Fewer choices for local metro networks
- CLECs will lose reasonable access to AT&T collocations/POPs

# UNDUE BOC ADVANTAGE IN THE ENTERPRISE MARKET

- BOCS will use AT&T/MCI strengths along with anticompetitive tools to dominate the enterprise market.

# **PROBABLE DEMISE OF INDEPENDENT FACILITIES-BASED IXC's**

- Independent facilities-based IXC's not likely to survive because BOC's will shift traffic to affiliates.
- For the first time since 1984, a majority of the nation's traffic will be handled exclusively over BOC networks.
- Increased dependence on ILECs -- not only for local access but long distance service as well.

# **CONCENTRATION, COLLUSION IN THE IP BACKBONE MARKET**

- Post merger, fewer IP backbone providers will likely have the same volumes of traffic as Verizon and SBC
- Current approach to peering would permit Verizon and SBC to charge all others higher prices
- Further BOC acquisitions would compound the concentration
- Control of IP backbone enables discrimination in price and quality of interconnection
  - Discrimination in favor of ILEC affiliate facilitated

# CONDITIONS

- Safeguards against discriminatory treatment of competitors.
- Reduce undue in-region concentration
- Safeguards to assure open IP-enabled marketplace
- Transition safeguards
- Enforcement

# **SAFEGUARDS AGAINST DISCRIMINATION**

- All Agreements Between Bells Regarding Access Available To Others Via Contract or Tariff
  - Lowest Rate Must Be Available For Opt-in Regardless Of Volume Or Term
- Set Special Access Pricing Based On LRIC

# **SAFEGUARDS AGAINST DISCRIMINATION (Cont'd)**

- Comprehensive UNE and Special Access performance metrics
- Continuation of Section 272 separate affiliate
  - For existing as well as acquired LD.
- BOCs now using 272 affiliate even in states where the requirement has lapsed

# **REDUCE UNDUE IN-REGION CONCENTRATION**

- Divestiture of in-region AT&T and MCI local exchange and exchange access facilities.
- Divestiture of in-region AT&T and MCI mass market, small and medium-sized business customers, and enterprise customers.
  - “Fresh look” opportunity.

# **SAFEGUARDS TO ASSURE OPEN IP-ENABLED MARKETPLACE**

- Divestiture of IP backbones, or require provision of interconnection and transit service to non-peering ISPs and CLECs based on LRIC pricing with separate sub with public contracts.
- Net neutrality requirements prohibiting ILEC blocking, or provision of inferior access to non-ILEC IP-enabled services

# TRANSITION PLAN

- Promotional discounts for UNEs and Special Access for 3 years, beyond existing plans.
- Commitment not to raise existing Special Access prices pending completion of LRIC price cases.

# ENFORCEMENT

- Self-enforcing conditions to the extent possible, especially with respect to performance metrics.
- Authorize states to enforce merger conditions.
- Performance metric penalties paid to competitors.
- Meaningful penalties beyond cost of doing business.