between the two wire centers – more than 75 percent of routes have at least one fiber-based collocator on *both* ends of the route (excluding MCI) and over 40 percent of those routes have at least three such collocators on both ends (excluding MCI).[122] As explained below, there is no valid reason for excluding AT&T and SBC from this analysis, but even if they were excluded, it would make little difference: more than 70 percent of routes still have at least one fiber-based collocator on each end; more than 50 percent still have at least three on each end; 60 percent still have at least one collocator on *both* ends; and nearly 30 percent still have at least three on both ends.

In addition, the maps included in Exhibit 2 likewise demonstrate that removing AT&T's and SBC's known fiber routes makes no virtually difference. That is, even with AT&T and SBC removed, other competitive fiber remains on *all* the routes where AT&T and SBC had deployed fiber. That is, the same competitive fiber routes still appear on the maps, and no additional MCI-deployed fiber is shown where there is no other known fiber based on the third-party data available to Petitioners. The only difference is that 7 of the 73 central offices shown on the map of New York no longer are identified as having fiber-based collocation.

But there is no merit to Staff's focus on transport deployed by AT&T and SBC. Even after those two companies have combined, that transport will remain in place as a competitive alternative to Petitioners' facilities. Speculation that SBC/AT&T would be likely to refrain from competing in New York defies common sense.[123] As an initial matter, because a key purpose

[122] For example, on the route in New York City between wire centers NYCMNY13 and NYCMNYVS, *six* carriers other than MCI have established fiber-based collocation on both ends of the route. In addition, two have established fiber-based collocation on both ends of more of the 487 routes than MCI has **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**, and a third carrier has established fiber-based collocation on the same number of routes as MCI. Six other carriers have established fiber-based collocation on both ends of at least 55 of the 487 routes.

[123] *See* White Paper at 34.

and benefit of this transaction is the increased ability of the combined company to compete on a national and global scale, one of the primary rationales for this transaction would accordingly disappear if Verizon/MCI were to cease competing for customers in the SBC region.[124] It is simply not credible to suggest that Verizon and MCI would combine and then abandon their business in the extensive SBC region, or that SBC/AT&T would do the same in Verizon's region, as this would result in both companies losing business to competitors willing and able to provide service in both Verizon's and SBC's regions. The California Attorney General recently reached the same conclusion, finding that such collusion "would entail enormous opportunity costs" – as it would entail "ceding [national and global] customers to [the] many competitors in the enterprise market" – "would offer little chance of success," and "ignore[s] SBC's history of competing [with Verizon]."[125]

Indeed, Verizon and SBC currently compete extensively. For example, Verizon has deployed 300 miles of optical network facilities in Los Angeles to compete directly with SBC and has also extended its optical fiber into SBC's region in the Dallas MSA.[126] SBC, similarly, has obtained fiber-based collocation arrangements in central offices that contain 70 percent of Verizon's business lines in the Los Angeles MSA, as well as in central offices that contain 87 percent of Verizon's business lines in the Dallas MSA, and that contain 41 percent of Verizon's business lines in the New York MSA. Verizon also competes for enterprise customers in 28 out-

[124] SBC and AT&T have likewise informed the FCC that they in fact plan to compete aggressively with Verizon if their merger is approved, and that "SBC is investing $16 billion to acquire AT&T precisely *because* it seeks to compete more effectively for businesses with national and international operations, including those with operations in the 30% of the country served by Verizon." Ex Parte Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, FCC, WC Docket Nos. 05-65 & 05-75, at 4 (May 17, 2005).

[125] Opinion of the Attorney General on Competitive Effects of Proposed Merger of SBC Communications Inc. and AT&T Corp. at 30-31, Application No. 05-02-027 (Cal. PUC filed July 22, 2005).

[126] *See, e.g.*, Verizon News Release, *Verizon Plugs in New National Broadband Network* (Apr. 14, 2004) (Verizon operates an IP/MPLS backbone with routers in several SBC cities, including Dallas-Fort Worth and Los Angeles).

of-franchise areas, 17 of which are in SBC's service area.[127] SBC has recently won a major contract with the American Red Cross in Washington, DC, and SBC Telecom competes with Verizon for business customers in Albany, Nassau-Suffolk, New York City, and at least 10 other areas.[128] Verizon's VoiceWing VoIP service competes with SBC by offering area codes in 11 of SBC's 13 states, including California and Texas. There is also extensive head-to-head competition between Verizon Wireless and Cingular, and a number of the major markets where Verizon has deployed its 3G wireless broadband service (EvDO) are within major metropolitan areas in SBC's territory.[129]

c. The Remedies Offered For Consideration Are Unnecessary And Should Not Be Adopted As Conditions To Approval

Because there is no basis on which to conclude that this transaction will have a material, negative effect on the availability of transport facilities in New York, there is no basis for any of the remedies that Staff proposes for consideration. As explained below, there are additional reasons why the Commission should not adopt any of Staff's suggested remedies, in particular that they pertain to *inter*state services over which the Commission lacks jurisdiction. Indeed, virtually all of the wholesale transport services that Verizon and MCI offer in New York are interstate services, with Verizon's provided under FCC tariff and MCI's provided under contract. As such, they are governed exclusively by the FCC and this Commission would violate federal

[127] *See* Bruno *et al.* Reply Decl. ¶ 15 (Attachment 5 to Joint Opposition of Verizon Communications Inc. and MCI, Inc. to Petitions To Deny and Reply to Comments, WC Docket No. 05-75 (FCC filed May 24, 2005)).

[128] See New Paradigm Resources Group, CLEC Report 2005, Ch. 6 – SBC Telecom at 7-8 (19th ed. 2005); see SBC News Release, SBC Communications Announces Five-Year, $59.7 Million Contract with the American Red Cross (Apr. 18, 2005).

[129] *See* Verizon Wireless, *Wireless Internet BroadbandAccess, available at* http://www.verizonwireless.com/b2c/mobileoptions/broadband/index.jsp.

law in attempting to regulate the rates, terms and conditions on which Verizon and MCI offer those services.[130]

1. Freezing MCI's Rates, Terms, and Conditions. Petitioners have already made clear that the post-transaction company intends to honor MCI's existing contracts for wholesale services. But there is no possible basis for freezing the rates, terms, and conditions "that [MCI] provided pre-merger, or which are currently tariffed or offered under SPAs, for a period of 36 months from the date of the merger."[131] And it is unnecessary: MCI already provides its wholesale services pursuant to contracts that have a usual term of a year, and it has entered – and remains willing to enter – into contracts for a longer term.

The "smaller carriers" that Staff apparently believes would benefit from this measure could procure wholesale service from the numerous other providers in those limited areas where MCI has deployed fiber networks in New York. Furthermore, contrary to the claims of some parties, MCI – as a "larger" carrier – does not obtain additional discounts on wholesale purchases of transport from Verizon, nor does MCI make a substantial business of reselling circuits that it purchases from ILECs as special access.

First, the majority of Verizon's special access discount plans in New York, including all of its DS1 discount plans, are *term* based, so that the same significant discounts are available on an order of a single DS1 or 1,000 DS1s.[132] Therefore, Verizon's special access pricing structure

[130] *See AT&T Co. v. Central Office Tel. Inc.*, 524 U.S. 214, 227 (1998); *Boomer*, 309 F.3d at 417-24.

[131] White Paper at 37.

[132] For example, Verizon has circuit-specific plans available in New York with discounts ranging from about 5 to more than 40 percent, depending on the term selected by the customer, which can range from one to ten years. *See, e.g.*, FCC Tariff No. 11, § 7.4.10. Verizon also offers two basic types of non-circuit specific plans in New York: Facilities Management Service (where customers buy Verizon's services managing network facilities and are charged for the capacity used in DS-0 equivalents) and Commitment Discount Plans (where the discount level is based on a term of years, not volume, and the discounts available are the same as those in the circuit-specific plans). *See, e.g.*, *id.*, § 7.2.17 (FMS), § 25.1 (CDP).

does not provide the kind of volume discounts that would give MCI any unique ability compared to other carriers.[133] In New York, for example, a number of competing carriers pay lower average rates for DS1 special access channel terminations than MCI. Even assuming that Verizon were to begin offering the kinds of volume discounts that would make such aggregation viable, MCI is by no means uniquely situated to play that role. Not only do many competing carriers already have wholesale operations, but there is no need even to operate as a carrier to enter this business – at least two companies, Global Internetworking and Last Mile Connections, have recently entered that business as carrier-agnostic wholesalers, with the former reporting that it already provides access to more than 500,000 lit buildings.

Second, the reality is that MCI resells ILEC special access to only a minimal extent today, and does not resell circuits obtained entirely from Verizon as special access. Indeed, only about one-quarter of MCI's total wholesale revenues for its Metro Private Line services (roughly equivalent to Verizon's special access) are earned from circuits where MCI uses ILEC special access at all. In the overwhelming majority of those cases, these are "Type II" circuits, where MCI uses ILEC special access for the channel termination to extend MCI's network to an off-net building. With respect to these Type II circuits, nothing about the transaction will affect the availability of the Verizon channel terminations – at the currently tariffed discount rates – to any carrier wishing to use them to complete a circuit.

2. Standardizing Rates, Terms, and Conditions for Verizon. Staff also seeks comment on whether standardizing the "rates, terms and conditions contained in commercial agreements

[133] Verizon also offers contract tariffs to its wholesale special access customers on an MSA-wide basis – and generally across multiple MSAs – in areas where it has obtained either Phase I or Phase II pricing flexibility. The total billed revenue plans available in New York, which generally have one-year terms, offer credits based on a customer's total billed revenues from traditional special access services. Services provided anywhere in Verizon's territory count towards the overall total revenue threshold. *See, e.g., id.* § 32, Options 13, 20, 24, 25.

between Verizon and competitive carriers" could be "an effective tool to ensure the competitiveness of the transport market."[134] It is unclear exactly what Staff has in mind. Verizon provides wholesale access to transport through tariffs, which necessarily provide standardized terms and conditions. In addition, these tariffs provide for stable, discounted pricing through long-term commitments; indeed, virtually all purchasers of special access take advantage of such term plans. And, because the bulk of the wholesale transport that Verizon sells is pursuant to *federal* tariffs, this Commission lacks jurisdiction over such sales.

Alternatively, the Staff may be referring to commercial agreements that Verizon might enter into with competitors for transport on those routes where DS1 and DS3 transport are no longer available as UNEs. Verizon has not entered into any such agreements to date, largely because standardized terms and conditions are already available – along with significant discounts – pursuant to tariffs. Nor will the Commission have any jurisdiction over such agreements, in the event Verizon enters into one. To the extent Verizon provides DS1 or DS3 transport through a commercial agreement, it is doing so to fulfill an obligation under 47 U.S.C. § 271. And the courts and the FCC have made clear that state commissions have no authority to regulate agreements to provide elements under § 271.[135]

3. Expanding Transport-Related Retail and Wholesale Performance Measurements. Staff seeks comment on whether "the transport market-related retail and wholesale performance metric definitions [should] be expanded to help identify and monitor the market concentration

[134] White Paper at 37.

[135] *See Qwest Corp. v. Schneider*, No. CV-04-053-H-CSO, slip op. at 14 (D. Mont. June 9, 2005); *see also MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.* 298 F.3d 1269 (11th Cir. 2002) (state commission authority under § 252 is limited to implementing § 251(b) and (c)); Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337, ¶ 8 & n.26 (2002) ("only those agreements that contain an ongoing obligation relating to section 251(b) or (c)" are "interconnection agreement[s]" covered by section 252).

effects of the merger" and whether there "[i]s . . . an enforcement or facilitation role for the Commission."[136] The short answer to both questions is "No."

First, the premise on which these proposed remedies are based – *i.e.*, that competition for wholesale transport services will be reduced – is flawed. Verizon and MCI are by no means the sole – or even two of a relatively few – suppliers for transport services. There are a myriad of network architecture and supplier choices available to end users in this market, including AT&T, which will remain a significant competitor in this market after its merger with SBC.

Second, as Staff notes, the existing performance measurements were developed specifically to monitor *service quality*. They are not designed or intended to measure market concentrations and it would be inappropriate to attempt to modify the transport retail or wholesale metric definitions for that purpose. Service quality measurements reflect the outcome of work processes that are managed by the company and largely within its ability to control (barring extraordinary events and the like). They cannot, as a practical matter, be used to gauge the extent of competition for the services included in the performance measurements, particularly given the difficulties attendant to gathering data that could be used to gauge competition.

Third, measuring "market concentration effects" is far different from measuring service quality or performance. The former involves a macro perspective of the market at issue and entails analysis of numerous economic, technical and other factors that influence micro behaviors of consumers and suppliers. There already exist means by which to measure market concentration and it is by no means clear how performance measurements could be developed to measure the "effects" of market concentration. Even if it were possible or desirable to develop such measurements, Verizon should not bear the burden of gathering and reporting additional

[136] White Paper at 37.

data, particularly when none of its competitors will have to bear a comparable burden. And unless all of Verizon's competitors were required to report data used in the performance metrics, the Commission could hardly develop complete measures of concentration.

In any event, the existing retail and wholesale transport measurements (which have been in place for many years and which have been developed collaboratively with other carriers) 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. Any such service quality declines will be evident from Petitioners' reported performance under the current measurements. In the event such declines occur, Staff and the Commission can investigate the reasons for the decline and take steps to address it, as even Staff acknowledges in the White Paper.[137]

Finally, while it is not clear what type of "enforcement" or "facilitation" roles Staff had in mind here, it is clear there is no need for any Commission action pertaining to the quality of transport services. As noted, the existing measurements already provide adequate information concerning the levels of service being provided and the Commission already has adequate authority under the Public Service Law and its regulations to address declines in service. And the Commission has already acknowledged that it has no jurisdiction to enforce any rule or regulation in connection with interstate special access services.[138]

[137] *See* White Paper at 52 ("the Commission . . . has a number of options at its disposal to address declines in service quality"). In fact, the interplay between competition and service quality is being addressed separately in the Intermodal Proceeding, in which other carriers are participating. It would be inappropriate to amend the existing metrics in the context of this proceeding.

[138] *See* Letter from Maureen O. Helmer, Chairman of the New York PSC, to Hon. Michael Powell, Chairman of the FCC (May 22, 2001) (advising that the NY Commission "would be willing to establish and enforce service standards on all special services, *if this were a matter your agency believed should reasonably be delegated to New York State*." (emphasis supplied)).

4. Divestiture of MCI's New York Transport Network. Staff questions whether "divestiture of the MCI New York transport network [is] practical and viable."[139] As an initial matter, it bears repeating that the evidence of actual deployment of competitive fiber networks in New York – as opposed to the limited data set Staff considered – demonstrates that this transaction will not result in any meaningful "increase in concentration" that needs to be "offset."[140] Therefore, there is no basis for considering the divestiture of MCI's transport network in New York.

In any event, divestiture is neither "practical [nor] viable." It would threaten serious disruption and interfere with the decision of enterprise customers to contract with MCI to provide the local component of their service over MCI's facilities. MCI's "New York transport network" is, in fact, constructed of fiber rings that are highly integrated with MCI's long distance, Internet, and data networks. These shared facilities, therefore, serve not only the New York customers that MCI serves entirely over its own facilities or in part using third-party facilities, but also customers outside of New York (and, indeed, outside of Verizon's territory). In addition, such divestiture would be a complex, costly, and disruptive process for MCI's New York customers served using the shared fiber transport facilities, whether those customers are served using MCI's self-deployed fiber loops or facilities obtained from other carriers. MCI's enterprise customers chose MCI because MCI offered a competitive combination of expertise, service, and price; there is no basis for the Commission to divest these sophisticated customers of their choice to remedy a non-existent problem. Divestiture would increase, not decrease, customer disruption and potentially disadvantage New York-based enterprise customers to the

[139] White Paper at 37.

[140] Id.

detriment of the New York economy. Finally, divestiture of these facilities would substantially reduce efficiencies to be obtained through this transaction.

4. Special Access And High-Capacity Loops

a. This Transaction Will Not Reduce The Extensive Competition For Enterprise Customers Purchasing Special Access Channel Terminations And High-Capacity Loops

As far back as 1999, the Commission acknowledged that the market for high-capacity services is "already competitive."[141] And Staff recognized in the White Paper that there has long been competition to serve these customers, initially from the "Competitive Access Providers (CAPs) [that] were one of the original types of facilities-based telecommunication industry competitors."[142] Competitors serve these customers using either self-deployed high-capacity loops or facilities obtained from other carriers, including special access channel terminations (*i.e.*, loops) from Verizon. As explained above, these competitors include traditional IXCs such as AT&T, Sprint, and Qwest; CLECs like XO and Level 3; cable companies such as Time Warner and Cablevision; systems integrators and managed service providers like IBM, EDS, Accenture, Northrop Grumman, and Lockheed Martin; major global telecommunications providers such as Equant, British Telecom, Deutsche Telekom, COLT, KPN Telecom, and NTT; equipment vendors like Lucent and Nortel; and, most recently, major application providers such as Microsoft.

Retail competition for these customers has advanced to such an extent that Verizon is primarily a wholesale provider for this customer segment. As much as 80 percent of Verizon's special-access revenues nationally comes from sales to other carriers, rather than from sales

[141] Case 98-C-0690, Order Directing Tariff Revisions (Mar. 24, 1999), at 8.

[142] White Paper at 38.

directly to end-user business customers. This is true for Verizon's sales of special access overall and for its sales of DS1s and DS3s in particular – roughly 85 percent of Verizon's revenues for DS1s and DS3s comes from sales to other carriers, which then use those facilities to provide service to enterprise customers. These customers include not only large enterprises, but also small and medium-size businesses such as antique dealers, book stores, dry cleaners, florists, gas stations, and hair dressers, to name a few. Moreover, as shown above, numerous companies – in addition to MCI and AT&T – successfully compete against Verizon to serve enterprise customers, both in New York and across the country. Those carriers will continue to compete aggressively for this lucrative business following this transaction. In addition, as noted above, Verizon and MCI rarely compete head-to-head: of the more than 800 instances between October 1, 2004 and April 20, 2005 in which MCI bid on enterprise contracts, Verizon was among the competing bidders less than 4 percent of the time.[143]

This transaction will have no material effect on this extensive competition. MCI has established direct fiber connections to only **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** end-user buildings in New York, which are referred to as "on-net" or "lit" buildings.[144] In contrast, MCI serves roughly 40 times that number of buildings in New York – approximately **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** – using third-party facilities, including special access purchased from Verizon.[145] And, based on the lit-building lists provided by the limited subset of CLECs which offer to sell MCI dedicated access

[143] *See* July 1, 2005 Ex Parte Letter at 2-3 n.5.

[144] MCI has also established direct fiber connections to **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** Verizon central offices where MCI has established fiber-based collocation, as well as to **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** carrier hotels. These facilities, which carry high volumes of traffic, are readily duplicated by other carriers, as the FCC has found. *See TRRO* ¶¶ 12, 20, 30, 141.

[145] As explained above, MCI receives no unique discounts on these special access purchases.

services in New York, these few competitors alone provide fiber to approximately 57 percent of MCI's lit end-user buildings in New York – about **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] such buildings. The actual number is undoubtedly higher, because MCI does not have lit building information from numerous carriers known to have such buildings in the former Bell Atlantic footprint, such as Sprint, Level 3, Broadwing (Focal), Cavalier/City Signal, Global Crossing, Qwest, and Broadview. Nor does it include the extensive fiber networks that have been constructed by utilities and other fiber wholesalers.

Moreover, approximately 85 percent of MCI's lit buildings in New York either have customer demand at the OCn or near-OCn level (which is not available as a UNE[146]) or are located in wire centers where Verizon is not obligated to provide UNE DS3 transport. In addition, nearly 75 percent of buildings in New York lit with MCI fiber are within *0.05 miles* – or *88 yards* – of known competitive fiber routes, with an average of nearly 4 such routes within 0.05 miles of those buildings. For these reasons, there is nothing unique about the bulk of the fiber that MCI has deployed to enterprise customer locations in New York, and nothing about the transaction will adversely affect the ability of the large number of other fiber providers in close proximity to MCI's fiber to "light up" buildings should MCI's wholesale prices rise.

b. Staff's Analysis Is Flawed

Staff did not conduct HHI calculations for special access and high-capacity loops.[147] Instead, Staff highlighted a variety of factors in support of its conclusion that there is an "obvious" "anti-competitive aspect" to this transaction with respect to these high-capacity

[146] *See TRRO* ¶¶ 12, 20, 30.

[147] *See* White Paper at 42.

facilities.[148] Contrary to Staff's claims, none of the purported facts to which it points supports that conclusion.

First, Staff describes MCI as one of "Verizon's two largest wholesale market competitors" for special access services.[149] But, as shown above, MCI is a far larger *purchaser* of special access than a potential alternative *supplier* of such facilities. MCI serves approximately 40 times as many buildings using third-party facilities, including special access purchased from Verizon, than it serves using its own fiber loops. MCI's wholesale business, moreover, is tiny in comparison to Verizon's – MCI's national wholesale Metro Private Line Revenues represent just 2 percent of Verizon's total wholesale special access revenues. For these reasons, there is no merit to Staff's concern that this transaction could harm smaller carriers that purportedly rely on wholesale purchases from MCI. In any event, Petitioners have stated that the combined company intends to honor existing contracts.

Second, Staff claimed, based on its review of "maps containing MCI's New York City (NYC) loop and data facilities," that there "are large overlaps between Verizon and MCI local loop facilities, especially in the NYC area."[150] But Staff ignored that MCI's local loop facilities reach only **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** end-user buildings in all of New York, and that there are *equally large* – if not larger – overlaps between Verizon's network and other carriers' local loop facilities. This is particularly true in New York City, which the attached maps show is awash in competitive fiber.

[148] *Id.* at 45.

[149] *Id.* at 40; *see id.* at 41, 44.

[150] *Id.* at 42.

Third, Staff suggested that this transaction might "potentially increas[e]" prices.[151] But this suggestion is flawed, as an initial matter, to the extent it assumes that customers will lose the protection of existing contracts. Petitioners have made clear that they intend to honor existing contracts. Moreover, continued competition from other facilities-based competitors in virtually all of the areas where MCI has deployed local fiber in New York (as detailed above) would prevent the merged company from raising prices. In addition, Staff's concern ignores the highly limited nature of MCI's fiber loop deployment in New York, as detailed above. MCI is hardly a ubiquitous presence, and could not affect prices throughout the state. Any attempt to raise prices would give competitors an opportunity to capture additional business using existing facilities, or an incentive to extend their facilities and compete by undercutting Verizon's and MCI's price in the same manner that Competitive Access Providers have been doing in New York for years.[152]

c. The Remedies Offered For Consideration Are Unnecessary And Should Not Be Adopted As Conditions To Approval

Because there is no basis on which to conclude that this transaction will have a material, negative effect on the availability of special access and high-capacity loop facilities in New York, there is no basis for any of the remedies that Staff proposes for consideration.

1. Freezing MCI's Rates, Terms, and Conditions. As with Staff's similar proposal for transport, there is no possible basis for freezing MCI's rates, terms, and conditions for a period of three years. As explained above, Petitioners have already made clear their intent to honor MCI's existing contracts for wholesale services. In addition, MCI's fiber loops reach a small number of buildings, and competitors already do – or readily could – reach the overwhelming

[151] *Id.* at 44.

[152] Equally meritless is Staff's speculation that Verizon/MCI might engage in "price or rate collusion" with SBC/AT&T. As explained above, it is economically implausible to assume that SBC would spend billions of dollars to purchase AT&T's extensive assets in New York and then not use them to compete vigorously. In addition, Verizon and SBC are currently engaged in significant competition with each other.

majority of these locations. And to the limited extent MCI resells high-capacity facilities that it obtains from Verizon, it does not receive any unique discounts on those services that it could pass on to other carriers. Finally, these are interstate services over which the Commission has no jurisdiction.

2. *Extending Expiring Verizon Interconnection Agreements.* Staff questions whether Verizon should be required to extend interconnection agreements that are due to expire within 12 months of this transaction for an additional three years.[153] As an initial matter, such an extension is entirely unrelated to this transaction – any such agreements would expire and need to be renegotiated regardless of this transaction – and therefore would be an inappropriate condition. In addition, the Commission lacks the authority to mandate a change to the term of an agreement, as such negotiated provisions are "binding" on the parties.[154] In any event, it is difficult to identify any benefits from such an extension. Because Verizon's UNE obligations are established by federal law and implemented in New York through a tariff that is incorporated into virtually all interconnection agreements, extending the agreements would not alter Verizon's current or future UNE obligations. Thus, if this condition were imposed, then Verizon would be stuck with provisions negotiated long ago that are entirely unrelated to this transaction and that can be expected to be outdated in the legal and competitive context in 2007 or 2008.

3. *Special Services Retail and Wholesale Performance Measurements.* Staff asks whether "the special services market-related retail and wholesale carrier-to-carrier performance metric definitions [should] be expanded to identify and monitor the market concentration effects of the merger" and whether there "[i]s . . . an enforcement or facilitation role for the

[153] *See* White Paper at 45.

[154] 47 U.S.C. § 252 (a)(1); *see Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2000).

Commission."[155] Staff proposed similar remedies in connection with its analysis of transport. Neither remedy should be adopted for the reasons set forth above. In short, it is inappropriate to attempt to use metrics to monitor market concentration. Adequate metrics already exist, and the expansion of these metric definitions will discourage parties from resolving matters on a business-to-business basis. And, to the extent that the special access services at issue are interstate, this Commission lacks jurisdiction over them.

4. Standardizing Rates, Terms, and Conditions for Verizon. As with Staff's proposal for transport, it is unclear whether Staff is referring to Verizon's tariffed offerings (which are already standardized) or to commercial agreements that might be entered into with respect to high-capacity loops that are no longer available as UNEs (and over which the Commission has no jurisdiction). In either event, this would be an inappropriate remedy for the same reasons as discussed above.

5. Divestiture of MCI's New York Fiber Loop Network. For many of the same reasons set forth above with respect to MCI's transport facilities, the "divestiture of MCI's New York fiber loop network" would be neither "practical [nor] viable."[156] It would be costly, complex and time-consuming. No divestiture order could prevent a customer from switching providers if the customer did not wish to have service provided facilities owned and operated by the purchaser of the divested facilities. Instead, MCI's fiber loops were deployed to take advantage of the efficiencies in an end-to-end architecture, and MCI's facilities were not designed to provide space for collocation or facilities for interconnection with the network of the new owner.

[155] White Paper at 46.

[156] Id.

III. THE TRANSACTION WILL NOT INTERFERE WITH RETAIL OR WHOLESALE SERVICE QUALITY

A. There Is No Reasonable Basis On Which To Conclude That The Transaction Will Adversely Affect Retail Service Quality Or To Adopt Any Remedies Relating to Retail Service Quality

In assessing whether the transaction will adversely affect service quality in New York, Staff:

> Tentatively conclude[d] that today the sheer number of intermodal competitors for telecommunications services has significantly reduced the need for incorporation/application of a VNY *statewide* service quality rebate program and the requirement for a VNY *statewide* service quality rebate program as part of the merger is not required.
>
> Most customers who experience what they perceive as inferior telephone service quality or price have other options – they can change to a competing service provider in a matter of days, including VoIP, broadband or wireless carriers. Consumers exercising choice by changing carriers is not surprising. To the contrary, such actions are the natural evolution from a monopoly to a competitive market, and evidence of the Commission's goal to encourage competitive choice.[157]

Petitioners concur with these Staff findings and tentative conclusions. They are supported by the facts presented in Petitioners' May 13 Reply Comments and in these Comments, as well as the facts amassed by Staff in the *Triennial Review* proceeding. They are also consistent with the Commission's own view that it is no longer necessary or appropriate to impose service quality plans on Verizon NY when the competitive market is already imposing the discipline necessary to ensure that the company will continue to meet the service quality demands of all customers, whether residential or business.[158]

[157] *Id.* at 50 (emphasis in original).

[158] Transcript of Public Service Commission Meeting (Feb. 9, 2005) at 26, 28-29 (service quality incentive plans are no longer desired or necessary).

Petitioners disagree, however, with Staff's findings that "these competitive alternatives and opportunities . . . are *not* universally available" and that "there may be no opportunity to take advantage of some broadband voice choices due to limited build outs, and/or other limits on the 'reach of technology.'"[159] Contrary to Staff's belief, and as demonstrated above, competitive alternatives to Verizon's traditional wireline services are being offered by cable companies, wireless providers, Internet and broadband services providers, and VoIP providers throughout Verizon's service area in New York. There is no need to adopt a service quality rebate plan targeted to what Staff calls "captive customers" because there are no captive customers.[160]

Staff's analysis of the availability of competitive alternatives here is deficient in several respects. First, Staff focuses almost exclusively on the availability of broadband voice services, ignoring wireless and satellite alternatives altogether. Although Staff acknowledges cable telephony as a competitive alternative, Staff expresses a concern that "cable telephony is . . . limited to where cable companies have built out cable systems." Yet cable build-out is no limitation at all. Cable companies now pass 7,156,178 of the 7,193,381 total homes in New York, or ***99% of all homes in the state.*** Of those homes passed by cable, 99% are broadband ready (and therefore, capable of receiving broadband and VoIP services), and 96% are cable

[159] White Paper at 50 (emphasis in original).

[160] In its discussion of transaction-related service quality issues, Staff notes that "the Commission believes that the quality of telecommunications services is a public interest concern and, in approving past mergers, has generally incorporated service quality protections." *Id.* at 46. Staff cites, in particular, the extensive service commitments to which NYNEX agreed when the Commission approved the Bell Atlantic/NYNEX merger. Although, as noted, Staff is not suggesting that similar commitments be made in the context of the instant transaction, it must be stressed that the levels of competition that exist in New York today far surpass the levels of competition that existed at the time of the Bell Atlantic/NYNEX merger such that it would be completely inappropriate to adopt in this proceeding service quality protections that are even remotely similar to those that were adopted in the other merger proceeding. Indeed, it is worth noting that the Commission did not request *any* service quality commitments when it approved the Bell Atlantic/GTE merger.

telephony ready.[161] Moreover, cable providers can use wireless technologies to extend services beyond the limits of their wired plant and, indeed, are already doing so. For example, Time Warner uses Wi-Fi technology to extend the reach of its cable routes.[162] Comcast, Charter and Cox have either utilized or tested wireless line extensions to serve customers previously out of reach.[163]

Second, contrary to Staff's suggestion, broadband services (and hence, "broadband voice services" as Staff calls them) are available in virtually every part of Verizon's service area in New York. As of December 2004, there were 39 high-speed broadband providers operating in New York.[164] There is at least one broadband provider in every zip code in New York and there are three such providers in 83% of the zip codes in New York.[165] And 19% of all New York zip codes have ten or more broadband providers.[166]

Staff finds other reasons to question whether these competitive alternatives pose a threat of "customer flight" that will provide Verizon with "a strong incentive . . . to address retail service quality."[167] Like its mistaken belief that broadband and VoIP services are not universally available in New York, Staff's other beliefs concerning possible limitations of these services are based on a misapprehension of the facts. For example, Staff contends that Verizon "ignores the

[161] Petitioners' Reply Comments at Table 1; U.S. Census Bureau, Statistical Abstract of the United States, 2004-2005, Table 56 and American FactFinder, New York, 2000, 2002 and 2003. Note that count of homes passed excludes RCN and that total New York households for June 2004 are estimated.

[162] *See* http://www.cabledatacomnews.com/jul05/jul05-7.html.

[163] See, e.g., Multichannel News, Cable's Quiet Growth Pump; Commercial Sales: $1 Billion a Year and Growing Fast (Aug. 23, 2004).

[164] FCC Industry Analysis and Technology Division Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2004* at Table 6 (July 2005).

[165] *Id.* at Table 13.

[166] *Id.*

[167] White Paper at 52.

incremental cost associated with purchasing VoIP service for customers without broadband."[168] According to Staff, "[m]any do not want to pay for broadband."[169] However, contrary to Staff's belief, the cost of broadband service is not an impediment for New York customers who wish to obtain VoIP services. That is because VoIP services are marketed and purchased largely on the basis of *marginal* costs to consumers who have already made the decision to subscribe to broadband in order to obtain high-speed internet access. The logic that the cost of broadband must be considered as a cost for VoIP service would require that rent or mortgage costs be included in the cost of basic wireline service since a customer must have a residence to receive that service.

The rapid growth of VoIP subscriptions means that traditional wireless voice providers like Verizon cannot afford to assume that the cost of broadband service generally deprives consumers of the VoIP option. As explained in Petitioners' Reply Comments, Vonage is adding some 15,000 new VoIP subscriptions per week; Comcast is adding 1,000 new subscribers per day; and Cablevision added nearly 100,000 new subscribers in first quarter 2005 alone. And these are just a few of the VoIP providers serving New York customers. Obviously, the incremental cost of adding VoIP service is not preventing customers from moving from traditional voice telephony services to the digital voice services offered by the cable companies and VoIP providers that are signing a growing number of new VoIP customers every day.

Yet even if the price of broadband and VoIP packages is more than some customers want to pay, it matters only that a significant number of customers would defect to such packages in the event that the quality of Verizon's voice services were to decline to the degree that Staff

[168] *Id.* at 53.

[169] *Id.*

believes it could if not protected by a service quality plan. Said differently, the availability of VoIP services is itself sufficient to motivate Verizon to maintain the level of services that its customers demand; otherwise, those customers can and will switch to VoIP services and, in effect, punish Verizon for its decline in service.

Staff also suggests that the transaction will somehow reduce Verizon's incentive to overcome the existing technical limitations to its ability to offer a stand-alone DSL service on an unrestricted basis to all customers. Staff questions whether the Commission should, as a condition of approval, impose a deadline by which Verizon should make such a service available.[170] The Commission should do nothing of the sort. As discussed above, such a condition is not only unlawful but also unnecessary. Verizon is already striving to offer stand-alone DSL to all customers who want it as soon as possible since Verizon realizes that it needs to offer such a service to stay competitive with the cable companies and VoIP providers that are rapidly signing broadband and VoIP subscribers. The transaction will not change these marketplace realities, which provide all the incentive that Verizon needs to make this service available to all customers.

Since competitive alternatives – whether cable telephony, wireless, broadband and Internet communications, or VoIP – are available throughout Verizon's service area in New York, there is no reason to adopt any type of service quality gateway that would "limit Verizon's ability to increase rates in areas where neither a competitive nor a service quality gateway is passed."[171] Such "gateways" should be rejected for other reasons as well. Given the dynamic nature of the marketplace, adopting a "competitive" gateway applicable to discrete parts of

[170] *Id.* at 54.

[171] *Id* at 51.

Verizon New York's service area – and applicable to Verizon alone among all competitors – makes no sense. A threshold set today could easily be surpassed tomorrow, yet Verizon would continue to be constrained by a gateway until the competitive situation is assessed anew.

On a more practical level, Staff's own attempts to gather data in the TRO proceeding prove that measuring competition has always been difficult at best because competitors are reluctant to disclose even highly aggregated information (such as, for example, numbers of subscribers), and those that do disclose their data are not always clear and consistent in their reporting. Moreover, publicly available information (such as FCC reports) rarely captures the full extent of competition, even on a statewide basis. The difficulties typically associated with gathering high-level competition-related data would be substantially compounded (if not insurmountable) if the data must pertain to a specific area, such as a wire center, where a gateway has been established because Staff believes available competitive alternatives provide inadequate incentive to maintain good service there. Thus, setting the bar for the competitive gateway and measuring progress against "passing the bar" would be problematic, if not impossible. And any data collection or impairment issues that would impede investigation into whether the gateway has been passed would unfairly harm Verizon since its ability to move beyond the gateway would have to await resolution of those issues.

Using a gateway to constrain pricing in those areas would raise technical issues as well. For instance, if service quality gateways were established for some discrete geographic area where Staff feels broadband services are no sufficiently available, then Verizon would be required to spend an inordinate amount of time and money to rework its billing systems to reflect the different price structures that might be required in those areas should Verizon fail to pass the gateways there. Such an approach would impose an enormous burden on Verizon but not on its competitors. It would also be unduly punitive.

Gateways are also unnecessary because the transaction presents no reason for concern that service will be disrupted. The "Agreement does not call for the merger of any assets, operations, lines, plants, franchises or permits of MCI's regulated subsidiaries with the assets, operations, lines, plants, franchises or permits of any Verizon entity"[172] and therefore presents no operational issues that might affect any of Petitioners' regulated New York subsidiaries. Although, as also noted in the Joint Petition, the transaction is expected to lead to a corporate wide reduction of approximately 7,000 employees, those reductions will not result in a disruption in service quality in New York (or elsewhere). Staff states that "[b]ased on the relative percentage of employees, one might expect approximately 1,166 (17% of 7,000) job cuts in New York State,"[173] and implies that such reductions could lead to declines in service. However, there is absolutely no reason to "expect" 1,166 job reductions in New York State since reductions will not be determined based on a state's "relative percentage of employees" or on any type of rote, mathematical process such as the one Staff presumes. As Petitioners explained in their May 13 Reply Comments, reductions will be made in duplicative jobs in those areas of the company where it is able to provide shared services more efficiently. It is also anticipated that headcount reductions will be possible in the *management* of functional areas that provide opportunities for synergies – *i.e.*, enterprise markets, mass markets, international and wholesale operations, and information technology. There has been no suggestion that the transaction will result in service-affecting reductions in headcount.

[172] Joint Petition at 6.

[173] White Paper at 47.

Finally, a service quality gateway (or any other type of service quality "incentive") is not necessary because the transaction will not affect the Commission's continued oversight of Verizon's or MCI's regulated New York subsidiaries. The Commission has always monitored service quality very closely and will certainly remain vigilant after the transaction is completed. It receives monthly service quality reports that are disaggregated to discrete geographic areas determined by reference to reporting entities. These reports include service inquiry reports which detail the reasons any particular reporting entity failed to achieve threshold performance levels for any three of five consecutive months, and the plans for restoring service to the required levels. Should Verizon's service quality in any area decline after the transaction is completed, the Commission can take action to address the situation (just as it has in the past).

B. There Is No Reasonable Basis On Which To Conclude That The Transaction Will Adversely Affect Wholesale Service Quality Or To Adopt Any Remedies Relating to Wholesale Service Quality

1. The Transaction Will Not Adversely Affect Wholesale Service Quality

Staff tentatively concluded that "the merger has the potential to impact Wholesale Service quality and availability."[174] Specifically, Staff suggests that "Verizon may have less initiative to fulfill its obligations to provide good Wholesale Service quality in a post-merger environment."[175] This is incorrect.

As discussed in the Joint Petition, the Agreement does not in any way affect Verizon's obligations to provide wholesale services to its CLEC customers in New York pursuant to the applicable state tariffs and interconnection agreements. The transaction will not change the nature of this business as Verizon will continue to offer local access facilities to its carrier

[174] *Id* at 56.

[175] *Id.*

customers under tariff and contract. For its part, when MCI makes capacity on its local fiber networks available to other competitors, it generally does so pursuant to one year or longer contracts, which the post-transaction company intends to honor. Wholesale customers receiving service from Verizon and MCI will benefit from greater efficiencies in the provision of wholesale high-capacity local access services by increasing the instances in which they can meet their needs with a single vendor.

The competitive marketplace is currently imposing incentives for Verizon to provide excellent service to its wholesale customers,[176] and will continue to do so after the transaction is completed. Should Verizon's wholesale service quality decline, its wholesale customers might lose their end-user customers to other modes of telephony, such as cable telephony or VoIP. The market figures show that Verizon cannot even hope to win back these end users in anything like the numbers necessary to make up for the loss of wholesale revenues. It makes more sense for Verizon to retain its wholesale revenues by providing high quality wholesale services than to lose those revenues by losing wholesale customers whose own retail customers perceive an opportunity to obtain higher quality service from intermodal competitors.

In short, the elimination of MCI as a competitor for wholesale services will not reduce Verizon's incentive to deliver high quality service to wholesale customers. Numerous competitors are providing these services today and will continue providing those services after the transaction is completed. The transaction will not diminish Verizon's incentive to maintain the levels of service demanded by customers who can readily obtain these services from any of the several remaining providers.

[176] In March 2005 Verizon's Wholesale Market Group received the coveted Empire State Gold Award for providing excellent service to its Wholesale customers in New York.