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September 21, 2005

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

Re: ***Ex Parte*** SBC/AT&T and Verizon/MCI Mergers, CC Docket Nos. 05-65, 05-75, Access to Loops And Merger Conditions

Dear Chairman Martin:

The proposed merger of MCI, Inc. ("MCI") with Verizon Communications, Inc. ("Verizon") and the near-simultaneous acquisition of AT&T Corp. ("AT&T") by SBC Communications, Inc. ("SBC") is a watershed event in the telecommunications industry that will create two "Super-RBOCs" and effectively reconstitute the former Bell System monopoly in almost 40 percent of the country. These "Super-RBOCs" will, taken together, control over 63% of the nation's access lines and more than 50% of the wireless lines, while still declining to compete out–of-region with each other.[1] These mergers will substantially undermine, perhaps irreversibly, the limited competition that exists in the crucial market for "bottleneck" access services, especially channel terminations, which serve as an essential input for nearly every other downstream communications service. Indeed, as MCI appropriately put it when commenting on a prior merger involving Verizon's predecessor, approving these pending mergers "would be tantamount to carving most of the United States into two huge regions each controlled by a single monopolist," which is clearly not in the public interest.[2]

The possibility that the two leading competitive carriers, internet backbone providers, and competitive access service providers ("CAPs") and purchasers could become affiliates of Regional Bell Operating Companies ("RBOCs")[3] compels the Commission to scrutinize carefully

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[1] *In the Matter of Application for Consent to Transfer Control Filed by Verizon Communications, Inc. and MCI, Inc.,* WC Docket No. 05-75, Comptel/ALTS Petition to Deny, at 36 (May 9, 2005) ("*Comptel/ALTS Petition to Deny*").

[2] Comments of WorldCom, Inc., *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* FCC CC Docket No. 98-184, at iv (Nov. 23, 1998).

[3] *Comptel/ALTS Petition to Deny,* at 37 (Taken together, "MCI and AT&T are responsible fro approximately 85% of the revenues of the competitive sector.").

and simultaneously the adverse competitive impact of both proposed mergers. This should lead it to reject the mergers, or at a minimum impose enforceable merger conditions intended to enable competitors to obtain access services at reasonable, non-discriminatory prices to ensure that some modicum of competition survives these mergers. If it permits these mergers to occur, the Commission should attempt to moderate their adverse competitive impacts of these mergers by imposing conditions that: require SBC and Verizon to *continue to make available and maintain their existing copper loop facilities for a minimum period of seven years*; require Verizon and SBC to treat the fiber collocations of MCI and AT&T as affiliated with an RBOC with respect to the thresholds for impairment for determining unbundled access to high capacity loop and transport under the Commission's UNE rules; eliminate pricing flexibility for SBC and Verizon, which has enabled them to raise special access prices; require SBC and Verizon to make their lowest special access prices available to competitors independent of volume or term commitments; and impose comprehensive UNE and special access performance metrics.

Verizon seeks to minimize the impact of its potential acquisition of MCI by making the dubious claim that there is no actual competitive overlap between the companies because the have only "complementary core competencies."[4] SBC maintains that its proposed merger with AT&T "will not produce any price-affecting increase in concentration in any special access markets because AT&T has only limited alternative facilities SBC's region, and there are many other CLECs with comparable local networks and greater wholesale capabilities."[5]

Contrary to these self-serving statements, the reality is that the proposed mergers will result in the two competitive access providers with the greatest breadth of service and potential to challenge the RBOCs – MCI and AT&T – departing from the wholesale access market. Their probable exit from the wholesale market would substantially diminish the already paltry competition that exists in the access market today.[6] In fact, according to data provided by SBC and

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[4] *In the Matter of Application for Consent to Transfer Control Filed by Verizon Communications, Inc. and MCI, Inc.*, WC Docket No. 05-75, Verizon Public Interest Statement, at 22 (March 11, 2005) ("Verizon Public Interest Statement"). Verizon also claims that "this transaction will have no countervailing adverse affects on competition." *Id.* At 18.

[5] *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AT&T Corp., Transferor to SBC Communications Inc., Transferee,* WC Docket No. 05-65, Joint Opposition of SBC Communications Inc. and AT&T Corp. to Petitions to Deny and Reply to Comments, at 23 (May 10, 2005).

[6] The Ad Hoc Telecommunications Users Committee, a group of large corporate and government purchasers of special access services, has determined that in the special access market ILECs "remain the sole source of connectivity at roughly 98% of all business premises nationwide, ever for these large" users who presumably have greater bargaining power and access to competitive alternatives than most businesses. *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM Docket No. 10593, Comments of the Ad Hoc Telecommunications Users Committee, Attachment A: Lee L. Selwyn, Susan M. Gately, and Helen E.

Verizon in the *TRO* proceeding, AT&T and MCI have at least 21,000 and 9,000 nationwide local route miles respectively and an estimated 50% of the competitive local fiber routes nationwide.[7] WilTel, a relatively large competitive IXC and large consumer of access services, reports that AT&T and MCI "offer service in nearly half of the total buildings where a CAP is present," and MCI is "by far, WilTel's largest competitive supplier of special access."[8] Further, as observed by SBC in the *TRO* proceeding, AT&T and MCI have imposed some price discipline on the RBOCs because they sell special access at rates that "typically were 15%-30% below, and sometimes more than 35% below, SBC's tariffed rates."[9] Thus, as a result of the mergers, carriers, integrators and users could lose the two most commercially significant suppliers of competitive access services in the home territories of SBC and Verizon.

The impact of the potential loss of these two important providers and purchasers of access services is heightened because the Commission has already substantially eliminated the RBOCs' competitors' unbundled access to high capacity digital loops and transport throughout much of the territories served by competitors, and has eliminated rate regulation of the RBOCs' special access services.[10] As a result of the *TRRO*, competitors to SBC and Verizon are even more dependent on these two RBOCs for access services, especially for bottleneck channel termination and loop facilities, a critical input for nearly all communications services. SBC and Verizon have already exploited the Commission's pricing flexibility rules and their competitors' growing dependence on special access services to raise prices or avoid lowering their prices in areas where they have been granted pricing flexibility despite the steadily declining costs that characterize the telecommunications industry.[11] The mergers will enhance the power and

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Golding, *Competition in Access Markets: Reality or Illusion, A Proposal for Regulation Uncertain Markets*, prepared for the Ad Hoc Telecommunications User Committee, at iv, 12, 16 (August 2004).

[7] *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, RBOC UNE Fact Report 2004, at III-4 (October 2004) ("*2004 RBOC UNE Fact Report*").

[8] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access,* WC Docket No. 05-25, RM-10593, Reply Comments of WilTel Communications, LLC, at 3, 14 (July 29, 2005) ("*WilTel Special Access Reply Comments*").

[9] SBC TRO Reply Comments, at 44-46 (Oct. 19, 2004).

[10] *Comptel/ALTS Petition to Deny*, at 4 (In granting pricing flexibility and reducing the RBOC's UNE obligations, "the FCC has relied upon a *perception* of competition, or worse – the promise of future competition, that does not match *reality*.").

[11] *See, e.g., WilTel Special Access Reply Comments*, at 18-22, Exhibits 4, 5, and 6. The fact that many special access rates have stayed the same despite declining costs is "tantamount to a price increase." Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, RM-10593, attachment, Declaration of Lee Selwyn (Nov. 8, 2004), at 8.

incentive for SBC and Verizon to further exploit their market power in the market for access services.

After the mergers, SBC and Verizon will have the irresistible incentive and an enhanced ability to exploit their market power in access services by engaging in price squeezing activities which will serve to increase the costs of key inputs to competitors and to undermine competition in numerous downstream markets.[12] As the FCC observed "business customers, commercial mobile radio service (CMRS) providers, interexchange carriers (IXCs), and competitive LECs all use special access services as a key input in many of their respective service offerings."[13] The Applicants will be able to engage in a price squeeze because while competitors will pay posted access costs that greatly exceed actual costs, the real price paid by SBC and Verizon's long distance, wireless, enterprise and other affiliates for special access is the facility's forward-looking economic cost because the portion of the charges for access services that exceed economic costs are merely an intra-company transfer payment.[14] In short, Verizon and SBC will be able to provide their own long distance, wireless, enterprise and other affiliates with strategic cost advantages for key special access inputs while still extracting supra-competitive prices for their access services purchased by competitors because special access charges to Verizon affiliates will be an intra-company charge that will simply flow from one Verizon pocket to another.

In addition, the mergers will eliminate the two largest non-BOC purchasers of special access services, which will dramatically reduce independent demand for such services. The elimination of AT&T and MCI as independent purchasers of special access services combined with the formidable barriers to entry and SBC and Verizon's exclusionary practices in the special access market will combine to make competitive entry unlikely even in the densest most attractive markets.[15] No other competitive carriers could realistically threaten to build their own special access facilities on a scale to compete with SBC and Verizon as could MCI and AT&T. As the Commission has recognized high construction costs, economies of scale, difficulties

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[12] *Comptel/ALTS Petition to Deny,* at 7, 12-13, 22 (The Applicants "will also have the ability and incentive to engage in non-price discrimination strategies, such as delaying, or degrading, provisioning of these essential inputs to competitors.").

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

[14] *Comptel/ALTS Petition to Deny,* at 23-24; *In the Matter of Application for Consent to Transfer Control Filed by Verizon Communications, Inc. and MCI, Inc.,* WC Docket No. 05-75, Comments of ACN Communications Services, Inc. *et al.*, at 32-33 (May 9, 2005) ("*Joint CLEC Comments*").

[15] *WilTel Special Access Reply Comments,* at 14; *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access,* WC Docket No. 05-25, RM-10593, Reply Comments of BT Americas, at 10-11 (June 13, 2005).

securing rights of way, obstacles in obtaining building access, and other operational impediments make it unlikely that competitive carriers can replace AT&T and MCI's access services.[16]

In addition to these barriers to entry, SBC and Verizon use exclusionary contract terms, their first-mover advantage and the ubiquity of their networks to lock in customer demand for special access and make it infeasible for competitors to capture even a portion of the demand. SBC and Verizon typically impose regional demand commitments and high penalties for termination of service and other exclusionary terms to lock in demand.[17] Because SBC and Verizon are the only source of special access loop facilities to every customer throughout their respective territories, they can use discount pricing plans that are founded on a regional demand and volume commitment to forestall competition. In fact, before the announcement of the planned mergers, MCI described such efforts by Verizon to lock in demand:

> [d]iscounts on the monopoly portion of a customer's demand are conditioned on choices for the competitive sensitive portion of demand. CLEC[s] cannot compete for a portion of the customer's business, because it would have to give an enormous discount to offset the higher cost incurred by the customer, which must surrender the [RBOC] discount.[18]

In short, under the Commission's present pricing flexibility regime, SBC and Verizon can and do use exclusionary contract terms to lock in their embedded base of access service customers and stymie competition regardless of the price differential between their access services and those offered by CAPs.[19]

In sum, the mergers will result in Verizon and SBC exerting even greater control of bottleneck facilities, including special access facilities. In light of the high cost of duplicating these facilities, SBC and Verizon's use of exclusionary practices to lock in demand for such facilities, and the potential for the Applicants to engage in price squeezing practices for the purpose of undermining competition in other communications markets, the Commission must at a minimum adopt enforceable merger conditions to ensure that competitors have non-discriminatory, reasonably priced access to Verizon and SBC's bottleneck facilities to compete. Specifically, the Commission *should require SBC and Verizon to continue to maintain existing copper loops*, the

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[16] *In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290, at ¶¶ 150-151 (Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

[17] *WilTel Special Access Reply Comments*, at 27.

[18] *Comptel/ALTS Petition to Deny,* at 13 (*quoting,* Comments of WorldCom, Inc. FCC Docket No. RM-10593, at n.13).

[19] *WilTel Special Access Reply Comments*, at 27.

associated outside plant[20] and associated operations support systems ("OSS"),[21] and preclude retirement and removal of these crucial "last mile" facilities for a period of seven years after a fiber overbuild. In the situation of a fiber overbuild, the Commission's existing rules permit the RBOCs to retire copper loops after meeting minimal disclosure requirements and only offer competitors access to a 64 kilobits per second ("kbps") transmission path of voice grade service over the fiber loop.[22] A single 64 kbps transmission path is of extremely limited utility to most competitors in the present market where even small business customers demand bundled services and a broadband transmission path. With continued access to a copper facilities, however, competitors will be able to compete with the Super-RBOCs by having the flexibility to offer voice, data or a combination of services via a broadband transmission path. SBC and Verizon have developed extensive OSS to manage the repair, maintenance, and provisioning of their loops and outside plant which would be extremely difficult for competitors to replicate. Thus, SBC and Verizon should be required to continue to provide these functions over a seven year period and recover their costs through cost-based loop prices.

Further, the Commission should revise its UNE loop and transport rules, especially the tiered thresholds, to reflect the loss of competition from the two largest competitive providers of access services, purchasers of access services and fiber collocators. The proposed mergers of Verizon/MCI and SBC/AT&T would make MCI and AT&T affiliates of these RBOCs with respect to fiber collocations. If the mergers are approved, the Commission's rules regarding access to UNEs established in the *TRRO*[23] should reflect the reality of this affiliation. Thus, the Commission should require as a condition of any approval of the mergers that Verizon and SBC treat MCI and AT&T as fiber collocator affiliated with an RBOC with respect to the thresholds for access to high capacity loop and transport UNEs.

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[20] Outside plant includes, among other items, poles, conduit, manholes, junction boxes rights-of-way, cables, pedestal terminals, other terminals, protection equipment and other infrastructure. James Harry Green, The Irwin Handbook of Telecommunications, 111-129 (4th edition, 2000).

[21] OSS consists of five functions including all manual, computerized and automated systems, business processes, databases, and information, such as loop qualification information, relating to preordering, ordering, provisioning, maintenance, repair and billing functions. As the Commission has conclude "no substitutable alternative market for OSS has developed because the incumbent LECs retain access to exclusive information and functionalities required to provide OSS services," and this "extensive infrastructure" would be "difficult, if not impossible, for competitors to duplicate." These conclusions "apply equally to the mass market and the enterprise market." *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, 18 FCC Rcd 16,978, Report and Order, at ¶¶ 561-566 (Aug. 21, 2003) ("*TRO*").

[22] 47 C.F.R. §§ 51.319(a)(3), 51.225 to 51.335.

[23] 47 C.F.R. §§ 51.319(a)(4)-(5), and (e); *Triennial Review Remand Order,* at ¶¶ 66, 126, 129, 146, 174-180.

Finally, if the mergers are approved, the Commission should mitigate SBC and Verizon's increase market power in the special access market by eliminating pricing flexibility for SBC and Verizon, which currently permits them to raise special access prices, and require SBC and Verizon to make their lowest special access prices available to competitors independent of volume or term commitments, and by imposing comprehensive UNE and special access performance metrics. These measures are especially important in light of SBC and Verizon's history of locking in customer demand for special access services in order to preclude effective competition.

Please contact the undersigned if you have any questions.

Sincerely,

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Edward W. Kirsch
Counsel for CTC Communications Corp.

cc: Chairman Kevin J. Martin
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
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