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BY ECFS

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

Re: SBC Communications Inc. and AT&T Corp., Applications for Approval of Transfer of Control, WC Docket No. 05-65; and

Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control, WC Docket No. 05-75

Dear Ms. Dortch:

Like many other commenters in these proceedings, Global Crossing North America, Inc. and T-Mobile USA, Inc. (the "Signatories") have previously shown that the proposed mergers of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T"), and Verizon Communications Inc. ("Verizon") and MCI, Inc. ("MCI"), raise substantial competitive issues in the special access services market. Despite the protestations of those four carriers to the contrary, there is ample evidence in the record of these proceedings to demonstrate the anticompetitive effects of the proposed transactions on that critical market. If the Commission approves the proposed transactions and permits SBC and Verizon to complete their acquisitions of their primary competitors for access services in their respective regions, it is critically important that the Commission place conditions on the merged companies to ensure that they do not engage in discriminatory practices in the provision of special access services or otherwise exercise pricing power in the special access services market. As set forth in detail below, the Signatories urge the Commission to adopt "final offer," or "baseball style," arbitration of special access agreements as one remedy to address the anticompetitive effects of the proposed transactions. This proposal is non-exclusive and is intended to complement other proposals made by the Signatories and other commenters in the proceedings.

The Communications Act requires that all carriers, including SBC and Verizon, negotiate contracts for special access services containing terms that are "just and reasonable."[1] In a competitive market, carriers would be able to negotiate reasonable access arrangements with SBC and Verizon. However, because of the limited nature of competition in the access market in SBC's and Verizon's respective territories, these carriers have a decisive advantage in

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[1] *See, e.g.*, 47 U.S.C. §§ 201-202.

negotiating rates, terms and conditions for access. Further concentrating the supply of access services, the acquisitions of AT&T and MCI will eliminate the majority of the alternative supply in the access market, thus increasing SBC's and Verizon's incentive and ability to raise and sustain supracompetitive prices and dictate unreasonable terms and conditions. A framework under which requesting carriers can compel final offer arbitration will facilitate reasonable arrangements even in the face of SBC's and Verizon's increased market power.

The Commission has adopted a final offer arbitration remedy in the past to guard against the anticompetitive effects of increased market power on commercial negotiations. For example, just last year in its order consenting to News Corp.'s acquisition of an interest in Hughes Electronics Corp.,[2] the Commission found that the combination of News Corp.'s regional sports network ("RSN") programming with DirecTV's national distribution platform could result in price increases because News Corp. would be able to extract higher prices or other concessions from unaffiliated multichannel video programming distributors ("MVPDs").[3] The Commission therefore established "a neutral dispute resolution forum" to "provide a useful backstop to prevent News Corp. from exercising its increased market power to force rival MVPDs to either accept inordinate affiliate fee increases for access to RSN programming and/or other unwanted programming concessions or potentially to cede critical content to their most powerful DBS competitor, DirecTV."[4] This remedy would "allow MVPDs to demand commercial arbitration when they are unable to come to a negotiated 'fair' price for the programming."[5] As the Commission further explained, the arbitration condition is "intended to push the parties towards agreement prior to a complete breakdown in negotiations,"[6] because "[f]inal offer arbitration has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.'"[7]

The Commission's rules also prescribe the use of final offer arbitration to settle certain interconnection disputes.[8] As the Commission explained in its *First Local Competition Order* implementing the Telecommunications Act of 1996, "[a]dopting a 'final offer' method of arbitration and encouraging negotiations to continue allows us to maintain the benefits of final

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2 *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 (2004) ("*Hughes/News*").

3 *Id.* ¶ 173.

4 *Id.*

5 *Id.* ¶ 175.

6 *Id.* ¶ 174.

7 *Id.* (quoting Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003, at 264).

8 47 C.F.R. § 51.807(d)-(f).

offer arbitration, giving parties an incentive to submit realistic 'final offers,' while providing additional flexibility for the parties to agree to a resolution that best serves their interests."[9]

Final offer arbitration has other important benefits for both carriers and the Commission. For carriers, such arbitration replicates, to the extent possible, conditions that would exist if there indeed were a competitive market. For the Commission, this approach avoids the difficult ratemaking and regulatory oversight that would otherwise be required to ensure that carriers achieve reasonable special access rates, terms and conditions.

In the *Hughes/News* transaction, the Commission defined the procedures that should apply in final offer arbitration, in the event that initial attempts to negotiate a commercially reasonable agreement fail.[10] Substantially the same procedures can apply here. The Signatories propose that the procedure be as follows:

1. Commercial Arbitration Remedy

- The commercial arbitration remedy is available to:
  - Any carrier seeking special access services ("Requesting Carrier"[11]) from SBC or Verizon in their respective territories that, 90 calendar days following the closing of the SBC or Verizon transaction, respectively, has more than 180 calendar days remaining on its existing special access agreement with such carrier.
  - Any Requesting Carrier following the expiration of its existing special access agreements with SBC or Verizon.
  - Any Requesting Carrier that makes a request for a special access agreement with SBC or Verizon and that does not currently have such an agreement.
  - References to SBC and Verizon include any subsidiary or majority owned or controlled enterprise, including but not limited to AT&T and MCI.
- Thirty days after requesting the negotiation of a special access services agreement from SBC/Verizon, a Requesting Carrier may notify SBC/Verizon within five business days that it intends to request arbitration over the rates, terms and/or conditions of access. Such terms and/or conditions may be price or non-price based.

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9 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499, at ¶ 1294 (1996).

10 *See, e.g., Hughes/News* at ¶ 222.

11 A Requesting Carrier includes any customer of SBC, Verizon, AT&T and MCI that purchases special access services.

- Upon receiving timely notice of the Requesting Carrier's intent to arbitrate, SBC/Verizon must immediately allow continued access under the same terms and conditions of the expired or expiring agreement, as long as the Requesting Carrier continues to meet the other obligations of the agreement. SBC/Verizon shall provide to Requesting Carriers making first-time requests access pursuant to tariff, although if different rates are subsequently determined as a result of the arbitration, such rates will apply retroactively to the access services provided during the period prior to final agreement.

- Following the Requesting Carrier's notice of intent to submit the dispute to arbitration, but prior to filing for formal arbitration with the American Arbitration Association ("AAA"), or a mutually agreed upon neutral third-party arbitrator (who along with the AAA are hereinafter referred to as the "Arbitrator"), the Requesting Carrier and SBC/Verizon will enter a "cooling off "period during which negotiations will continue.

- The Requesting Carrier's formal demand for arbitration, which shall include the Requesting Carrier's "final offer," and any supporting arguments and evidence, may be filed with the Arbitrator, no earlier than the fifteenth business day after the Requesting Carrier serves its intent to arbitrate on SBC/Verizon. SBC/Verizon must participate in the arbitration proceeding.

- The Arbitrator, will notify SBC/Verizon and the Requesting Carrier upon receiving the Requesting Carrier's formal filing.

- SBC/Verizon must file a "final offer" with the Arbitrator within two business days of being notified by the Arbitrator that the Requesting Carrier has filed a formal demand for arbitration.

- The Requesting Carrier's final offer may not be disclosed until the Arbitrator has received the final offer from SBC/Verizon. Upon receipt of both offers, the Arbitrator shall simultaneously provide a copy of the Requesting Carrier's final offer to SBC/Verizon, and a copy of SBC/Verizon's final offer to the Requesting Carrier.

- The final offers shall be in the form of a contract for access services for a minimum period of 1 year and a maximum period of 3 years, with automatic renewals.

2. Rules of Arbitration

- The arbitration will be decided by a single arbitrator mutually agreed to by the parties or selected by the AAA from members of its Telecommunications Panel and shall be conducted under the expedited procedures of the AAA Commercial Arbitration Rules, excluding the rules relating to large, complex cases. The location of the arbitration shall be New York for Verizon and Los Angeles for SBC.

- The Arbitrator shall choose the "final offer" of the party which most closely approximates the prevailing commercially reasonable rates, terms and/or conditions in the industry with respect to the access services at issue. In the absence of current data, the Arbitrator will consider evidence of pre-merger conditions, and contracts with AT&T and MCI shall carry a presumption of commercial reasonableness .

- To determine commercial reasonableness, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession) including, but not limited to:

    - Current contracts between the Requesting Carrier and SBC/Verizon or other access services providers in the applicable SBC/Verizon operating company's territory without regard to confidentiality, non-disclosure, or other restrictive clauses contained in such contracts;

    - Current contracts between other access customers and SBC/Verizon or other access services providers in the applicable SBC/Verizon operating company's territory without regard to confidentiality, non-disclosure, or other restrictive clauses contained in such contracts;

    - Evidence of the relative value of the requested SBC/Verizon services compared to the services of other access services providers (*i.e.*, price, scope of service, quality of service, etc.);

    - Changes in the value of non-SBC/Verizon access agreements;

    - Changes in the value or costs of the provision of access services;

    - Evidence of rates, terms and/or conditions for comparable services;

    - Evidence of rates, terms and/or conditions for retail services;

    - Evidence of relevant practices in other industries; and

    - Pre-merger contracts for access services between AT&T and MCI and third parties.

- The Arbitrator may not consider offers prior to the arbitration made by the Requesting Carrier and SBC/Verizon for the access at issue in determining commercial reasonableness.

- If the Arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the Arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party and may consider such behavior in assessing the reasonableness of the offers.

- Following the decision of the Arbitrator, the terms of the new access agreement, including payment terms, if any, will become retroactive to the expiration date of the previous agreement. The Requesting Carrier will make an additional payment to SBC/Verizon in an amount representing the difference, if any, between the amount that is required to be paid under the Arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration. Similarly, SBC/Verizon shall issue a cash refund in an amount representing the difference, if any, between the amount that is required to be paid under the Arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.

- The result of the arbitration shall be binding on the parties, and judgment on the Arbitrator's award may be entered in any court having jurisdiction.

- Each party shall pay its own fees and costs, and the parties shall split the Arbitrator's fees and costs equally.

- The Arbitrator's decision shall be reviewable by the Commission.

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It is critical that the Commission place conditions on the proposed SBC/AT&T and Verizon/MCI acquisitions to ensure that the merged companies do not engage in discriminatory practices in the provision of special access services. As outlined above, the Commission should establish a framework to facilitate final offer arbitration to help remedy the anticompetitive effects of the proposed transactions on the special access services market.

Respectfully submitted,

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