COMPTEL

October 21, 2005

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

Re: **Notice of Ex Parte Presentation-**
<u>DA 05-656, WC Docket No. 05-65 and DA 05-762, WC Docket No. 05-75</u>

COMPTEL submits this letter to propose certain conditions designed to ameliorate the anticompetitive consequences of SBC's proposed merger with AT&T and Verizon's proposed takeover of MCI. COMPTEL and numerous other parties have demonstrated that these mergers are profoundly anticompetitive and they should be rejected outright. As such, the merger conditions proposed herein cannot possibly eliminate the substantial competitive and public interest harms created by these mergers. The Commission can only truly serve the public interest by denying the above-referenced license transfer applications.

At a minimum, however, COMPTEL respectfully suggests that the Commission adopt conditions that, although they cannot fully cure the harms presented by these proposed mergers, may at least help restore the competition eliminated by them. In that regard, COMPTEL supports the UNE-related conditions proposed by Bridgecom International, Inc., *et. al* on October 18, 2005.[1/] COMPTEL also endorses the proposal by Global Crossing and T-Mobile for baseball style" arbitration of special access agreements.[2/] As described in those ex parte submissions, those conditions will help restore the existing and potential competition lost as a result of the mergers.

COMPTEL is concerned, however, that more is needed to help ensure that competitive providers of wholesale local transport continue on the road toward providing a reasonable competitive alternative to BOC special access services. To achieve this result, COMPTEL respectfully suggests that the Commission adopt the conditions described herein. Certain of these conditions amplify conditions already proposed. For example, parties have proposed fresh look policies and the elimination of anti-

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1/ Letter from Bridgecom International, Inc. *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, DA 05-656, WC Docket No. 05-64, DA 05-762, WC Docket No. 05-75, October 18, 2005 ("October 18th ex parte").

2/ Letter from Global Crossing North America, Inc., and T-Mobile USA, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-65 and WC Docket No. 07-75 (October 7, 2005).

competitive provisions in Verizon and SBC special access volume and term plans.[3/] Such conditions are critical to fostering facilities-based competition because they unlock demand that is currently committed to Verizon and/or SBC as a condition of receiving discounts from excessive base special access rates. Additionally, the Commission should ensure that Verizon and SBC do not retard competitive inroads through unreasonable grooming policies that can act as a gating mechanism preventing or slowing the migration of circuits to competitors or to more efficient arrangements for those remaining on Verizon's or SBC's networks.

In addition to these steps, the Commission must ensure that SBC and Verizon not simply rely on each other's special access services to serve customers in each other's territories. Instead, the Commission must establish appropriate incentives for SBC and Verizon to utilize competitive carriers wherever feasible and/or to build their own facilities out-of-region. Not only will this foster the development of facilities-based competition, it will reduce the ability of these companies to utilize wholesale relationships to engage in coordinated or collusive conduct in the retail market.

Finally, COMPTEL agrees with the concerns expressed by various parties on the mergers' effect on Internet peering. The mergers will create two "mega peers" that will have the incentive and ability to "de-peer" other Tier I Internet backbone providers.

COMPTEL proposes the following conditions to address these issues.

CONDITIONS TO PROMOTE A VIBRANT COMPETITIVE INDUSTRY

I. *Pricing*

The Commission must act immediately to constrain the merged firms' ability to raise prices to both wholesale and retail customers. COMPTEL believes the relief requested in the BridgeCom, *et al*., *ex partes* of October 18, 2005 and September 22, 2005 would help to promote a more competitive wholesale market. Similarly, as previously noted, COMPTEL supports the arbitration alternative offered by Global Crossing and T-Mobile.

271 Price Caps. COMPTEL wishes to specifically point to the importance of the Commission maintaining access to all network elements under Section 271 and capping these prices at 115% of the TELRIC rates. The Commission must clarify that, although switching and dark fiber are de-listed for 251 purposes, these elements must be available throughout the merged firms' ILEC territories at the Section 271 rates.

II. *Use of Competitor's Networks*

[3/] *See, e.g.,* Letter from Ad Hoc Telecommunications Users, *et al.*, to Marlene Dortch, Secretary, Federal Communications Commission, WC Dockets No. 05-65 and o5-75, October 17, 2005 ("October 17th ex parte") (suggesting fresh look and prohibiting bundling of non-competitive special access services with facilities subject to competition).

The Commission must ensure that Verizon and SBC do not simply rely on each other's special access services (or on the respective out-of-region facilities that each obtains as a result of the merger). By using each other's special access services rather than competitive facilities where available, Verizon and SBC can effectively collude to starve competitive carriers. Moreover, by entering into extensive wholesale relationships, Verizon and SBC can better detect and punish retail market "cheating," to the ultimate detriment of consumers.

The US Department of Justice Horizontal Merger Guidelines explicitly proscribe mergers that would better facilitate coordinated anticompetitive effects by the post merger firms in the market. The Guidelines explain:

> Where market conditions are conducive to timely detection and punishment of significant deviations, a firm will find it more profitable to abide by the terms of coordination than to deviate from them. Deviation from the terms of coordination will be deterred where the threat of punishment is credible. Credible punishment, however, may not need to be any more complex than temporary abandonment of the terms of coordination by other firms in the market.
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> Where detection and punishment likely would be rapid, incentives to deviate are diminished and coordination is likely to be successful. The detection and punishment of deviations may be facilitated by existing practices among firms, themselves not necessarily antitrust violations, and by the characteristics of typical transactions. For example, if key information about specific transactions or individual price or output levels is available routinely to competitors, it may be difficult for a firm to deviate secretly.[4]

The retail service markets that require special access as an input are particularly susceptible to detection and punishment when there is a single dominant input supplier of special access. It is easy to imagine a "routine" discount structure that provides for discounts at a certain level of access circuit demand (which corresponds to a mutually "tolerable" level of retail pricing), but which dramatically increases prices if future demand exceeds the "commitment" (a higher level of future demand would, ceterus paribus, anticipate a lower retail pricing structure). What is "routine" about these built-in detection-punishment mechanisms is that this is how SBC's current MVP tariffs are structured today![5]

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[4] Merger Guidelines, Section 2.12

[5] See generally, Reply Declaration of Joseph Farrell, in support of Reply Comments of COMPTEL, Global Crossing, and NuVox Communications, WC Docket No. 05-25 (¶ 6 explains that under SBC's most popular current discount contract, "above quota" demand is typically priced at the much higher "month-to-month" rate, unless the customer re-commits its additional demand to the term and volume contract. Post-merger, though, SBC and Verizon may simply choose to cap discounts at special access demand levels that correlate with existing retail price levels, and not make any discounts available to "above-quota" demand).

To counteract these harms, yet minimize prescriptive regulation, COMPTEL suggests that the Commission establish an overall level of usage of competitive (or self-deployed) facilities, including the migration of existing ILEC-provisioned circuits (including those being acquired by the mergers) to competitive carriers' transport facilities where available.

COMPTEL suggests that, within five years, 50% of SBC and Verizon out-of-region special access usage, as measured by, be met by non-ILEC providers (competitive providers or by self-deployment). To guard against "gaming" by the merged firms only serving customers served by AT&T or MCI "home run" fiber, the baseline for satisfying this requirement must be the 2004-2005 out-of-region spend on special access circuits by AT&T and MCI. SBC and Verizon should certify to the FCC annually the total amount of out-of-region special access usage and the percent supplied by competitive providers or over their own facilities. If SBC or Verizon fail to meet this threshold within that time frame, conditions that would otherwise sunset within that time should extended until such time as the threshold is met.

Additionally, the Commission should continue to require the out-of-region AT&T and MCI to maintain, at a minimum, the same proportional revenue contribution from wholesale sales that AT&T and MCI currently receive today. Thus, an important goal of the Commission should be to keep at least one of the two large competitors as an aggressive wholesale carrier in the other "mega-BOC" territory.

III. *Unlock Demand*

Fresh Look. The continued development of a vibrant and robust competitive local transport industry also depends on unlocking the special access demand currently captured by SBC and Verizon volume and term plans. SBC and Verizon should thus offer their carrier customers a fresh look opportunity to switch to competitive providers (or self-deploy). This fresh look option should apply to both SBC and Verizon plans and to AT&T and MCI contracts. To be meaningful, this fresh look must enable special access customers to reduce any purchase commitments without losing eligibility for the discounts and without incurring termination penalties (except as may be necessary to recoup special construction or other upfront, non-recurring charges not already recaptured).

Eliminate AntiCompetitive Conditions. Fresh look must be coupled with the elimination of anticompetitive provisions of SBC and Verizon volume and term plans. Specifically, the Commission should prohibit SBC and Verizon from imposing:

1) Volume commitments based on significant percentages of prior spend;
2) Discounts – particularly "first dollar" discounts – predicated on moving circuits off competitive carrier networks;
3) Restrictions on the ability to "port"circuits (*e.g.,* disconnect a circuit no longer needed at one location while purchasing a circuit for another location) without incurring penalties.

4) As a condition for special access discounts that carriers forbear from using UNEs or any specified percentage of UNEs.
5) Unreasonably short "opt in" time frames that have the effect of precluding potentially similarly situated carriers from utilizing contract tariffs.

IV. *Grooming*

The process of migrating circuits from SBC or Verizon to a competitive carrier is called grooming. Grooming is also used to establish more efficient network arrangements while remaining on an ILECs' network, thus enabling special access customers to reduce their costs. Grooming constitutes a gating mechanism that Verizon or SBC can use to prevent or limit that ability of customers to move to other carriers or to lower their costs through more efficient network arrangements. Carriers have voiced concerns about unreasonable and unjustified restrictions on the number of circuits that will be groomed and the costs of grooming.[6/]

COMPTEL urges the Commission to condition the mergers on the establishment of reasonable grooming policies that will facilitate competition. Specifically, COMPTEL suggests that Commission establish a standard interval of ten days by which time a groom must be accomplish, unless the requesting carrier seeks a longer time frame. As an incentive to meet this interval, grooms will be deemed accomplished by that time for billing purposes. In other words, if the groom is being sought to switch to another carrier, the switch will be deemed to have occurred by the tenth day and SBC or Verizon must stop billing for that circuit as of that day. If the groom is sought to increase efficiency and lower costs, SBC or Verizon must reduce, as of the tenth day, the charge for the circuit to the lower, more efficient rate that would result from the groom.

V. *Peering*

Various parties have explained the threat that these mergers pose to the current system of Internet peering among the "Tier I" Internet backbone providers.[7/] Through the current system of settlement free exchange of Internet traffic among Tier I providers competing for customers, the public receives low-cost, high-quality access to the Internet with a minimum of government regulation. The mergers, however, will create two super peers that, by the sheer volume of IP traffic carried, and ready access to a "sticky" end user customer base, can credibly threaten to "de-peer" other backbone providers and require them to incur potentially ruinous transit fees.

To mitigate this threat, COMPTEL supports the remedies proposed by SAVVIS and Broadwing:

6/ *See, e.g.*, Letter from Melissa Newman, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-65, DA 05-65 (October 5, 2005).

7/ *See, e.g.*, Letter from Broadwing Communications, LLC and SAVVIS, Inc. to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-65, WC Docket No. 05-75 (Aug. 12, 2005).

1. Require the merged entities to publish and comply with a non-discriminatory peering policy. This will create necessary transparency into SBC and Verizon's peering plans.

2. Maintain at least the same number of peering arrangements as AT&T and MCI maintain currently. This will ensure that SBC and Verizon do not establish discriminatory peering policies that only they can meet.

3. Prohibit the merged entities from denying peering based on the ratio of incoming to outgoing traffic. As a result of the merger, AT&T's and MCI's backbones will be vertically integrated with SBC's and Verizon's massive customer base of existing and potential wireline and wireless broadband Internet customers or "eyeballs," resulting in asymmetric traffic flows. Traffic will flow from the content providers, served by other Tier I peers, to the merged entities' customers. The Commission should not permit SBC or Verizon to use this imbalance as a pretext to 'de-peer' other backbone providers. SBC's current peering policy disclaims use of traffic ratios to deny peering.

VI. Implementation and Sunset of Conditions

To ensure that the conditions are meaningfully available to competitors, the Commission should require SBC and Verizon to: (1) submit any tariff revisions necessary to effectuate the conditions within 30 days of the Commission's order imposing the conditions; and (2) within 30 days submit to the FCC for approval a publicly available generic contract (much like an SGAT) that offers the adopted conditions. The submission, and approval by the Commission, of SBC's and Verizon's tariff revisions and generic contract, must be a precondition to final approval of the proposed mergers.

Many of the conditions proposed by other parties are slated to sunset after five years.[8/] COMPTEL suggests that conditions that would otherwise expire after five years continue to apply to SBC or Verizon, respectively, if they fail to meet the 50% competitive carrier usage threshold established above. The conditions would continue to apply until the threshold is met.

Respectfully submitted,

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8/ *See, e.g.,* October 18th ex parte (proposing to cap UNE rates, preserve existing UNEs and suspend DS1 loop and transport caps for five years).